Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
Debtor.

R. DAVID LEGG,
Petitioner,

versus

W. STEVE SMITH, Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July, 1994

68 pp

QUESTIONS PRESENTED

1. May a "death penalty sanction," which strikes a party's pleadings and enjoins him from further filings because of non-payment of monetary sanctions ordered by a bankruptcy court, be used against a bankruptcy litigant to deprive him of a jury trial in district court when that party is financially impaired?

2. May non-payment of monetary sanctions ordered by a bankruptcy court deprive a litigant of his Constitutional right to a trial by jury before a district court, in violation of due process guarantees?

3. Is the striking of pleadings based on the trial court's determination of disputed factual issues, in a motion hearing prior to jury trial, beyond the permissible scope, if any, of sua sponte dismissal pursuant to F.R.Civ.P. 12(b)(6)?

4. Does F.R.Civ.P. 41(b) require a court to impose a lesser sanction when one is available prior to sua sponte involuntary dismissal for noncompliance with court orders?

5. Does the filing of three cases in a period of nearly ten years, and the timely filing of an answer, compulsory cross-claim and counterclaim in another, as the Opinion below indicates, rise to the level of "harassing and vexatious litigation," invoking the district court's inherent authority to control its docket and sua sponte dismiss litigant's answer, compulsory cross-claim and counterclaim, on the eve of jury trial when that trial is the final case to be adjudicated in connection with a complex bankruptcy proceeding?

In accordance with Supreme Court Rule 14(b), Petitioner states that the following individuals and entities were original parties in the case under review and even though no party other than Trustee W. Steve Smith for United Markets International, Inc. made an appearance in the Court of Appeals below, each may have an interest in the outcome of this case:

W. Steve Smith, Trustee of United Markets International, Inc.

Essam Obaid

Obaid and Almulla Construction Co., Ltd.

Obaid Technical Services Co., Ltd

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OPINIONS BELOW

The Order of the District Court entered July 1, 1993, under appeal to the Fifth Circuit below is reproduced in

the appendix at C-1. The District Court's Order Withdrawing Reference for jury trial on Bankruptcy Adversary No. 87-0866, is reproduced in the appendix at page D-1. The District Court's Order Withdrawing Reference and of Consolidation in related Adversary No. 85-0932 is reproduced in the appendix at page E-1.

The Opinion of the panel of the Fifth Circuit is reproduced in the appendix at page A-1. The Order of the Fifth Circuit granting the filing of Supplemental Brief is reproduced in the appendix at page B-1. The Opinion of the panel of the Fifth Circuit in related case No. 90-6019 (appeal of consolidated Adversary No. 85-0932) is reproduced in the appendix at page F-1.

JURISDICTION

Bankruptcy Main Case No. 85-00872-H2-5 was commenced by the filing of an Involuntary Petition on February 7, 1985, pursuant to 11 U.S.C § 303. An Order for Relief was signed on March 28, 1985.

W. Steve Smith, Trustee of United Markets International, Inc., Debtor in Bankruptcy Main Case No. 85-00872-H2-5, commenced Adversary No. 87-0866 on August 7, 1987, in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, against Petitioner R. David Legg alleging fraudulent conveyance and against Essam Obaid, Obaid & Almulla Construction Co., Ltd. and Obaid Technical Services Co., Ltd. objecting to their claims. This action was filed pursuant to 28 U.S.C §§ 1334 and 157 and 11 U.S.C. §§ 105, 502, 541, 544, 547, 548, 549 and 550.

Pursuant to R. David Legg's motion, on July 1, 1992,

the Bankruptcy Court recommended to the District Court that the reference be withdrawn on Adversary No. 87-0866 so that a jury trial could be conducted. The District Court's Order Withdrawing Reference was entered July 20, 1992 pursuant to 28 U.S.C § 157(d).

The District Court's Order striking Legg's pleadings and enjoining him from further filings was entered July 1, 1993. Legg timely filed his Notice of Appeal to the Fifth Circuit on August 2, 1993 pursuant to 28 U.S.C. § 1291.

The Opinion of the three judge panel of the Court of Appeals for the Fifth Circuit affirming the District Court was entered on April 28, 1994. This petition has been timely filed within ninety (90) days of the Opinion entered by the Fifth Circuit.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of Article I and Article III of the Constitution of the United States, and the Fifth Amendment and Seventh Amendment thereto, are reproduced in the appendix at pages G-1, G-2, G-3 and G-3, respectively.

The relevant provisions of the United States Code hereto, 11 U.S.C. § 502(a) and 28 U.S.C. § 1927, are reproduced in the appendix at pages G-4 and G-4, respectively.

The relevant provisions of F.R.A.P. 38, Fed.R.Civ.P. 11, Fed.R.Civ.P. 12(b)(6), Fed.R.Civ.P. 41(b) and Fed.R.Bankr.P. 9011 are reproduced in the appendix at

pages G-4, G-4, G-6, G-6 and G-7, respectively.

CONSTITUTIONALITY OF ACT OF CONGRESS

This case calls into question the constitutionality of an Act of Congress and 28 U.S.C. § 2403(a) may be applicable. The United States Court of Appeals for the Fifth Circuit has not certified under 28 U.S.C. § 2403(a), to the Attorney General the fact that the constitutionality of an Act of Congress has been drawn into question.

STATEMENT OF THE CASE

On February 7, 1985, Essam A. Obaid (Obaid) and the Obaid & Almulla Construction Co., Ltd. (OBALCO) filed a Chapter 11 involuntary bankruptcy petition against United Markets International, Inc. (UMI), alleging over $2 million in claims. UMI timely answered denying said claims. Counsel for UMI subsequently entered an agreed order submitting to the entry of an order for relief. An order for relief was entered on March 28, 1985, adjudicating UMI bankrupt without admitting to the validity of said controverted claims. W. Steve Smith (Smith), Respondent, was appointed as trustee of the bankruptcy estate. Petitioner R. David Legg (Legg) is the sole shareholder of UMI.

On August 7, 1987, Smith commenced Adversary No. 87-0866 against Obaid, OBALCO, Obaid Technical Services Co., Ltd. (OTS) and Legg. Smith objected to the claims of alleged creditors Obaid, OBALCO & OTS, noting that they had recovered over $2.5 million from UMI after filing the involuntary petition. Obaid is the President and co-owner of OBALCO, and OTS is the alter ego of Obaid. Legg was alleged to have committed

various acts of fraudulent conveyance, claims which were later deemed waived by the Fifth Circuit below. *See* page A-9.

Legg filed his answer, cross- and counterclaims (1) denying liability and asserting the affirmative defense that all statutes of limitation had run as to claims against him, (2) joining in Smith's objection to claims against Obaid, OBALCO and OTS, (3) alleging acts of malfeasance against Smith in his role as trustee of UMI and (4) demanding a jury trial.

As a non-debtor party who had not filed a claim against the bankruptcy estate, pursuant to this Court's holding in *Granfinanciera v. Nordberg,* 492 U.S. 33 (1989), Legg sought to have the reference withdrawn to U.S. District Court for the jury trial. Smith objected, and three years of hearings ensued before withdrawal of reference was granted on July 20, 1992, permitting jury trial on the entirety of Adversary No. 87-0866. *See* page D-1. The case was docketed as C.A. H-92-2141, the case at bar.

Prior to this withdrawal of reference, the bankruptcy court granted Smith's motion to consolidate Adversary No. 85-0375 (a lawsuit previously filed by him against Legg in April, 1985, alleging fraudulent conveyance of Legg's homestead) with Adversary No. 87-0866.

A docket control order setting the matter for a two- to three-day jury trial in September, 1993, and setting dates for the completion of discovery was entered on March 19, 1993. Legg complied with all aspects of this order by identifying his expert witness, filing necessary motions and conducting discovery prior to the court's deadlines.

On May 3, 1993, Smith filed a motion seeking enforcement of various monetary costs and sanctions in excess of $68,000 which had been assessed against Legg in related UMI litigation during the three years Smith delayed the trial of the case at bar by fighting the withdrawal of reference. The majority of said sanctions (approximately $58,000) was owed to Obaid, OBALCO, *et al* and had been ordered by the bankruptcy court in 1989 under Adversary No. 85-0932 (the Sanctions Judgment) pursuant to F.R.Civ.P. 11 and corresponding F.R.Bankr.P. 9011. The amounts payable to Smith's law firm for legal fees, approximately $10,000, were ordered in 1989 under the Sanctions Judgment and in December, 1991 under C.A. H-88-1958 (the Rico suit), presumably under F.R.A.P 38 and/or 28 U.S.C. §1927, though no statutory basis was given. Legg objected to the enforcement and filed a sworn affidavit of financial inability to pay the amounts in question. Legg also objected to Smith seeking to enforce the entire $68,000 against Legg when Obaid, OBALCO, *et al* had not themselves sought enforcement and had failed to appear before the court in years (several of the parties to the Sanctions Judgment being deceased or defunct). Likewise, those who did still exist were subject to Legg's summary judgment as a matter of law for failure to answer requests for admissions in the case at bar.

Legg timely filed a motion for leave to amend his original answer, cross and counterclaims and a copy of the proposed amended pleading (reflected in the record below) designed to narrowly plead only personal causes of action against Obaid, OBALCO, OTS[1] and Smith[2] in conformance with

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[1]Legg joined in Smith's objection to Obaid, OBALCO and OTS's claims under 11 U.S.C. §502(a) which provides that any party in interest may object to claims against the bankruptcy estate. As the sole owner of UMI, Legg

judgments entered adverse to him in decisions from related UMI litigation during the five years since Adversary No. 87-0866 was initiated. Legg also succeeded in serving Obaid, OBALCO and OTS with requests for admissions pursuant to F.R.Civ.P. 36, interrogatories pursuant to F.R.Civ.P. 33, request for production pursuant to F.R.Civ.P. 34 and filed proof of service with the court. These requests for admissions, along with the interrogatories and request for production, were ignored by said parties. Pursuant to F.R.Civ.R. 56, Legg moved for summary judgment as a matter of law against Obaid, OBALCO and OTS as to liability only.

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has an economic interest in claims against the estate, is a party in interest and may be heard on any issue. ***In re Knapp***, 611 F.2d 703 (8th Cir. 1979); ***In re Woodmar Realty Co.***, 241 F.2d 768 (7th Cir. 1957); ***Coral Petroleum, Inc. v. Banque Paribas, London***, 797 F.2d 1351 (5th Cir. 1986).

Legg also asserted interference with economic advantage, loss of future business earnings, detrimental reliance, and indemnification - actions which are personal and cannot be property of a bankruptcy estate. See ***Boudreau v. Chesley***, 135 F.2d 623, 625 (1st Cir. 1943), ***Dallas Cabana, Inc. v. Hyatt Corp.***, 441 F.2d 865, 867 (5th Cir. 1971). A party suffering a loss peculiar to him has standing to assert a claim arising from such loss. ***Simon v. Eastern Kentucky Welfare Rights Organization***, 426 U.S. 26 (1976).

[2]Dealt with below in Legg's First Amended Answer, Counter and Cross-Claim, they include 11 U.S.C. §322(a) (failure to post an adequate security bond); 11 U.S.C. §704 (2),(5) & (7) (failure to timely account for property received, examine & object to claims and provide information concerning the estate to all parties in interest); 11 U.S.C. §1106(a)(3), (4) & (5) (failure to investigate the affairs of the debtor, file a statement of causes of action, and explain why a plan under §1121 will not be filed); and 11 U.S.C. §1121 (failure to file a plan of reorganization). Bankruptcy Rules willfully ignored by Smith include B.R. 1019(6) (failure to file a final report and account); 2003 (failure to hold a creditors meeting within 60 days); 2015(a) (failure to complete an inventory of the debtor); 3016(c) (failure to file a disclosure statement); and 3017(d) (failure to transmit disclosure statement to parties in interest).

Legg likewise sought discovery on Smith to gain access to any records of UMI in Smith's possession, Legg's personal bank records (also in Smith's possession, copies of which were not in Legg's possession) and information in Smith's files which could prove the allegations of professional malfeasance against Smith in his capacity as trustee that are not apparent in public records. Smith requested a protective order to deny Legg such access.

Hearing was set on June 25, 1993 on all pending motions. At the hearing, despite Legg's objection, the district court sua sponte withdrew the reference and consolidated Adversary 85-0932 (the Sanctions Judgment) with the case at bar to facilitate enforcement. After withdrawing the Sanctions Judgment for enforcement, the district court struck Legg's pleadings for failure to pay the amounts assessed, and enjoined further filings by Legg until all monetary sanctions assessed against him were paid. Said court also ruled Legg's other motions "moot," thus denying Legg leave to amend his answer, cross- and counterclaims to conform to the rulings in prior related matters and denying Legg's right to summary judgment as a matter of law against Obaid, OBALCO and OTS, the parties who were in default and to whom he owed the vast majority of sanctions. The ruling also denied Legg discovery on Smith, and thus denied Legg access to his own personal bank records in Smith's possession.

In accordance with the Order entered July 1, 1993, Legg filed with the district court a second sworn affidavit and financial statement (contained in the record below) setting forth in detail his deplorable financial condition and why he was unable to pay the $68,000. Legg then timely appealed to the Fifth Circuit.

After filing his appellate brief, Legg learned that Smith was no longer a partner in his prior law firm, the law firm he had appointed to represent himself as trustee in the bankruptcy proceedings. Since this law firm had been the party awarded monetary sanctions, and Smith was no longer authorized to represent them, Legg requested leave to file a supplemental brief which was granted on January 24, 1994, and challenged the order of July 1, 1993 on the basis of Smith's lack of standing to assert the amounts claimed for legal fees by his law firm.

The Opinion of the Court of Appeals affirmed the district court and found that the filing of three lawsuits by Legg, which it considered "frivolous," in the nine years that the UMI bankruptcy has been pending (along with defending himself in two other matters filed by Smith) constituted "vexatious and harassing litigation," thus justifying the "death penalty sanction" of striking Legg's pleadings on the eve of the jury trial that constituted the last lawsuit in the UMI litigation. *See* page A-11. The court likewise said that the striking of Legg's pleadings was the only way to control such "vexatious and harassing litigation" by a financially impaired litigant analogizing this case to others wherein a litigant had "ten patently frivolous petitions pending," *In re Sassower*, __U.S.__ (1993); fifteen appeals in a period of three years, *Gelabert v. Lynaugh*, 894 F.2d 746 (5th Cir. 1990); and twenty-three complaints in three years,*Moody v. Miller*, 864 F.2d 1178 (5th Cir. 1989). *See* page A-14.

When Legg raised justiciable claims under his amended pleading, the Court of Appeals relied on the district court's statements that it didn't believe Legg's factual allegations against Smith, ignoring the allegations of breach of fiduciary duty and malfeasance of his office as trustee under the Code. *See* page A-8. The court also relied on the district

court's statements that it didn't believe Legg's allegations against Obaid, OBALCO and OTS, despite the fact that recently obtained U.S. Army Corp of Engineer documents prove those claims to be false and fraudulent,[3] despite that Legg had a right to object to claims as a party in interest and despite those parties' non-appearance. *See* page A-9. The Court of Appeals also found that Smith had standing to assert the amounts payable as his legal fees. *See* page A-3, n.2.

The Court of Appeals originally chose not to publish its Opinion, however, the bankruptcy judge below and Smith requested publication on the grounds that this case sets new precedent for the use of "death penalty sanctions" against a bankruptcy litigant for failure and/or inability to pay monetary sanctions. Thereafter, the court decided to publish it's Opinion.

The appellate judgment was rendered on April 28, 1994, and this Petition for Writ of Certiorari was timely filed thereafter.

REASONS FOR GRANTING THE WRIT

1. *Death Penalty Sanctions against a Bankruptcy Litigant*

This is a case of first impression as admitted by Respondent Smith and the Chief Bankruptcy Judge for the Southern District of Texas.

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[3]On his own initiative, Legg reviewed the records at the U.S. Army Corps of Engineers (contract manager for the Saudi Arabian project which was the basis of the petitioning creditors' claims), and uncovered proof that the initial claims of OBALCO were false. Smith refused to even look at this material.

Smith, as a bankruptcy trustee, requested publication of the appellate opinion, citing that this case "discusses...[an] issue of significant public interest" and "applies an established rule of law to facts significantly different from those in previously published cases," as no opinions could be found *nationwide* authorizing death penalty sanctions against a bankruptcy litigant for the failure and/or inability to pay monetary sanctions. The fact that the Fifth Circuit has now expanded the law to include such litigants when no other circuit has chosen to do so creates an issue which should be ruled upon by this Court to insure uniformity in the federal adjudication process. Additionally, this is an important question of Federal Law which has not before been, but should be, ruled upon by this Court. Supreme Court Rules 10.1 (a) & (c). Referring to the "costs to the bankruptcy system" resulting from parties who oppose the actions of trustees, Smith and bankruptcy trustees nationwide intend to utilize the Opinion of the Fifth Circuit below as precedent to coerce "litigious debtors and principles of debtors" into compliance with the trustee. Whether or not this is a proper application of "death penalty sanctions," given that bankruptcy litigants are frequently financially impaired and unable to pay sanction awards (as in the case at bar), is an issue of "significant public interest" justifying review by this Court. This Court is requested to grant certiorari in the case at bar so that it may be used as a vehicle to pronounce uniform guidelines as to when and how "death penalty sanctions" imposed for the non-payment of monetary sanctions may be used against a financially impaired bankruptcy litigant.

The monetary sanctions below, with but one exception, arose from bankruptcy proceedings. The bankruptcy court also requested publication of the Fifth Circuit's appellate opinion stating its intention to utilize this opinion as

precedent giving it the authority to strike the pleadings of financially impaired bankruptcy litigants and enjoin them from further filings for non-payment of its monetary sanctions. There is no statutory basis for such an extensive application by a court of limited jurisdiction such as the bankruptcy court. Given that bankruptcy courts do not have the inherent powers granted to Article III courts, if this type of power is to be exercised by an Article I bankruptcy court, it is an issue worthy of consideration by this Court.

The statutory jurisdiction of the bankruptcy court is limited to the administration of bankruptcy estates, and relations between debtors and creditors. Monetary sanctions and their enforcement have nothing to do with either. This case should be reviewed by this Court before it is used as a basis for assuming such extra-judicial authority by courts of limited jurisdiction.

2. *Non-Payment of Monetary Sanctions*

Dismissal of a cause of action for non-payment of monetary sanctions is among the harshest of judicial actions. When, as in the present instance, jury trial has been granted and that trial is the sole remaining case related to a bankruptcy proceeding, dismissal on such grounds is violative of Fifth Amendment due process and the Seventh Amendment right to jury trial. There is a division among the circuits on this issue, with several holding, contrary to the Fifth Circuit in the case at bar, that the least harshest of sanctions is to be employed, *Hilton Hotels Corporation v. Banov,* 899 F.2d 40, 46, (D.C. Cir. 1990); *Langer v. Monarch Life Insurance Co, et al,* 966 F.2d 786, 811 (3rd Cir. 1992), and that payment of monetary sanctions is to be deferred until after trial on the merits. *In*

re Yagman, 796 F.2d 1165, 1184 (9th Cir. 1986). The Court is requested to review this issue to end the confusion and disparate results among the circuits.

As to a litigant's ability to pay monetary sanctions, such determinations can be made after conclusion of trial - which may itself improve or impair a litigant's financial standing. Only upon completion of trial on the merits in all cases related to a bankruptcy proceeding, can the totality of damages and costs be calculated. A party owing monetary sanctions to his adversaries prior to the final trial, as in the present case, may conceivably receive a favorable judgment, allowing set-off against the judgment of the prior sanctions orders, thereby minimizing enforcement efforts. On the other hand, tacking on sanctions awards to an adverse judgment will involve a minimum amount of the court's time. The resultant savings of judicial resources, not to mention protection of due process and jury trial guarantees, militates in favor of such a definitive ruling and is an issue worthy of this Court's consideration.

The awarding of monetary sanctions in UMI related cases occurred between two and four years _after_ Smith initiated the case at bar against Legg and Obaid, _et al._ In disregard of this Court's ruling in _Granfinanciera, supra._, Smith fought Legg's efforts to obtain his constitutionally mandated jury trial, thus intentionally delaying final resolution of the cause at bar. This Court is ask to decide what, if any, proscriptive effect the enforcement of monetary sanctions may have, and Legg will argue that same may not be given retroactive application to actions filed against a litigant prior to the awarding of those sanctions, regardless of when that previously filed lawsuit ultimately comes to trial.

3. *Rule 12(b)(6)*

The district court below declined to specify the statutory basis for its sua sponte dismissal, but stated on the record "[It's you] that's making unsubstantiated allegations." "I don't think you've got any personal claim against these people." *See* page A-8. "You don't have any claim against Mr. Smith." and, "I certainly don't find Mr. Legg to be credible." *See* page A-8. Despite the failure of Obaid, OBALCO and OTS to make any appearances before the court for several years, they received a favorable disposition of this case sua sponte.

Failure to state a claim upon which relief can be granted is the province of Rule 12(b)(6). This Court has specifically held that "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). The Court further stated "Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded...an opportunity to amend the complaint before the motion is ruled upon." In its following note, this Court raised the question whether there was any permissible scope of sua sponte dismissals under Rule 12(b)(6). Id. at 329, n.8. In the cause below, amendment was clearly denied Legg because of the district judge's disbelief of his factual allegations against Smith and against Obaid *et al.* Whether or not Smith has in truth "done his job as trustee" is one of the fact issues to be tried before the jury in accordance with the order withdrawing the reference not one to be determined by the district judge in a motion hearing.[4] *Id.* Bankruptcy trustees are not granted judicial immunity, nor are they

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[4] It should be noted that the district court judge issuing the withdrawal is also one who has had substantial prior contact with this case. *See* page D-1.

infallible. The right to sue a bankruptcy trustee without approval of the bankruptcy court for willful and negligent conduct has been firmly established. *Mosser v. Darrow*, 341 U.S. 267 (1951). Likewise, the validity of the claims of Obaid, OBALCO and OTS have not been adjudicated in any UMI proceeding on the merits, and U.S. Army Corp of Engineer documents now prove those claims to be false.

In the Sanctions Judgment and the Rico case (as well as other UMI related matters), cited by the Fifth Circuit, one of the main reasons Legg was chastised for his efforts was that Adversary No. 87-0866, now at bar, was pending and was deemed the "proper" vehicle for objecting to the claims of Obaid, OBALCO and OTS.[5] One of the numerous references to this in the record was the language of the Sanctions Judgment, ..."in fact, we observe that UMI is currently proceeding against certain defendants in bankruptcy court." *See* page F-6. As to personal causes of action existing on Legg's part, in the Sanctions Judgment, the Fifth Circuit granted rehearing and acknowledged a claim of emotional distress to be a personal cause of action. *See* page F-6, n.2. A loss of future income is also a personal cause of action. *See also* note 1 above.

The transcript of the hearing confirms at least one justiciable and meritorious cause of action against Smith, which is clearly pled therein. Smith conceded that the books

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[5]Indeed, Legg was many times told that if he had such an objection to take it to the correct forum - Adversary No. 87-0866. In 1987, the time sheets of Trustee's personal counsel, in the record below, specifically state that one purpose of the suit was to give Legg a chance to challenge the claims of alleged creditors Obaid, OBALCO and OTS. Smith's original petition challenged those claims, noting the recovery of $2.5 million after filing, and demanded verification of those claims against UMI in court.

and records of UMI were stolen, that he had been informed of their theft, and that they had been seen in the Virginia offices of OBALCO, yet he did nothing to secure their recovery.[6] This was a gross dereliction of his duty as trustee, and this failure to recover the single most important asset of the estate presents a meritorious cause of action. The trial court had no grounds to usurp the jury on this fact issue and arbitrarily determine that Legg had no claim against trustee Smith.[7]

This case is clearly contrary to this Court's holding in *Neitzke, supra.*, on the district judge's ability to dismiss an action on the basis of his disbelief of factual issues. Also, this case provides an excellent opportunity to examine the permissible scope, if any, of sua sponte dismissals under Rule 12(b)(6), and review is respectfully urged.

4. *Rule 41(b)*

Legg's inability to pay monetary sanctions was found to be noncompliance with court orders, justifying involuntary dismissal of Legg's answer, cross- and counterclaims. Though again the court did not specify a statutory basis for its ruling, this is governed by F.R.Civ.P. 41(b). The vast

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[6] Affidavits and sworn testimony of witnesses in this case and related proceedings, conclusively prove this. Smith has refused to obtain the records to date.

[7] As another example, the record reflects that the only creditors' meeting ever convened by Smith, required by the Bankruptcy Code to be held not later than sixty days after entry of the order for relief, was called in September, 1988 - ***three and one-half years*** late. Legg alleged that Smith's actions and inaction reveal the dilatory manner in which he administered the estate, and his must account for same to a jury.

majority of decisions employing Rule 41(b) refer to noncompliance with the trial court's own orders, not those of other courts. Moreover, in virtually all instances, Rule 41(b) involuntary dismissals arise when those court orders designed to speed the trial process, such as discovery orders and pleading deadlines, are ignored.

Here again, other circuits have expressed conflicting rulings with that of the Fifth Circuit in the case at bar, with several circuits holding that dismissal pursuant to Rule 41(b) is improper if less drastic alternatives are available. *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910 (2nd Cir. 1959); *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970). A recognized less drastic alternative when the offending noncompliance is nonpayment of monetary sanctions is to withhold consideration of the circumstances until after trial on the merits. *Yagman, supra.*, Cases related to a bankruptcy proceeding frequently involve many of the same parties, interrelated issues and last several years. Legg would argue that the less drastic alternative of conducting a two day jury trial (the last case in this nine-year bankruptcy) before enforcing death penalty sanctions against him should have been considered.

The Fifth Circuit has now circumvented the accepted practice of imposing a less drastic alternative to involuntary dismissal and thereby created an exception to this rule governing the non-payment of monetary sanctions. The Fifth Circuit and the district court below sought to enforce the monetary sanctions without regard to the constraints placed upon them by Rule 41(b), and less drastic alternatives to sua sponte involuntary dismissal were not

even considered.[8] Given the disparate results reached by the various circuits, the issue of mandatory consideration of less drastic alternatives to sua sponte involuntary dismissal pursuant to Rule 41(b) is ripe for the Court's review. This Court is requested to grant certiorari to resolve this conflict between the circuits.

5. *Inherent Power*

Does the filing of four lawsuits in a period of nearly a decade rise to the level of "vexatious and harassing litigation," invoking a court's inherent powers to dismiss a cause, thereby controlling its docket? The appellate opinion cites three cases filed by Legg since 1985 that it considered

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[8]One point of clarification is required with regard to those court orders of which noncompliance is alleged. The quotes in the appellate opinion of the trial judge would indicate a noncompliance with an order of the bankruptcy court to provide an accounting of UMI funds dispersed prior to the involuntary bankruptcy filing. This is misleading; Smith has never sought enforcement of this order and it was not mentioned in the district court's Order under appeal below. As the Fifth Circuit ruled that Smith has waived all other outstanding claims and allegations against Legg, the relevance of an accounting to the case at bar is doubtful. However, an accounting cannot be prepared without all of UMI's books and records according to Smith's appointed accountant in the bankruptcy main case, and those records were stolen by OBALCO as discussed above.

In May, 1988, over three years after the commencement of the case and despite the accountant's opinion concerning the state of UMI's records, Legg was ordered to account for dispersements out of UMI from the date of its founding in 1983. He repeatedly stated under oath his inability to perform this function due to the absence of essential records and providing the referenced sworn statements regarding the theft. From the bench, during the course of the hearing held June 25, 1993, the district court admitted "I don t know how you can make someone do something he says he can t." Impossibility of performance, rather than noncompliance with court orders, is the principal which rules this accounting.

frivolous.[9] The Fifth Circuit Opinion cites no other causes of action asserted by Legg either pro se or through counsel. It also cited two filed by Smith wherein Legg defended himself, and though Legg lost, his appeals were not called frivolous therein. In the latter of these two cases filed by Smith, Legg answered, cross- and counterclaimed. No other Court of Appeals has found this few number of suits over almost ten years to be "harassing and vexatious" and thus justifying death penalty sanctions. This Court's own ruling in *Sassower, supra.*, cited by the Fifth Circuit, allowed petitioner Sassower eleven certiorari and extraordinary writ filings in a period of three years before imposing sanctions upon him for having an additional ten "patently frivolous" petitions pending in a four months period.

It is difficult to respond to the charges of the Fifth Circuit that Legg has abused the court system and has brought meritless and frivolous claims and appeals. Legg would respectfully offer that they do not rise to the level of "harassing or vexatious" and do not constitute a "clear record of contumacious conduct" according to the law of this Court or any other Circuit. Legg's few cited efforts over nine years to obtain a jury trial hardly meets such a standard. Legg has not relished his battle for this jury trial, for it has taken its toll on both his personal life and his professional reputation.

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[9]It should be noted that the Fifth Circuit Opinion contains a factual error at A-6, n.6. Legg did not petition for certiorari to this Court from the appeal of H-88-1706; Legg petitioned for certiorari in November, 1992 (which was denied) from a related appeal that was not labeled frivolous by the Fifth Circuit or this Court. Previously, in October 1990, Legg petitioned for certiorari under no. 90-646 (which was denied) with regard to the seizure of his homestead; again, this appeal was not labeled frivolous by the Fifth Circuit or this Court.

Likewise, in castigating Legg, both the district court below and the Fifth Circuit ignored their previous admonitions to Legg that this Adversary No. 87-0866, was the avenue by which Legg should object to claims and assert his personal clauses of action against Obaid, OBALCO and OTS. A prima facie defense to any allegation that Legg's cross-claim is without merit, is the fact that these same claims have been challenged by Smith in the cause below, and that after years of effort by Legg, and over strenuous objections of Smith, withdrawal of reference for jury trial was granted.

Though the facts presented in the case at bar are useful for the purpose of resolving these issues, the questions presented are neither fact specific nor dependent upon development of evidence for resolution. Moreover, there is no reasonable likelihood that deferring consideration of these issues to a later day might cast them in a new, less perplexing light than that in which they appear in the present case. Nor should it be overlooked that, when other courts use the Fifth Circuit Opinion below as precedent in future cases, very few financially impaired bankruptcy litigants abused by the imposition death penalty sanctions will have the ability or the stamina to pursue appellate remedies to this Court.

Finally, the questions presented are of profound national significance, far transcending "the academic or the episodic," *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955), and involve important questions of federal law which have not been, but should be, settled by this Court. Supreme Court Rules 10.1 (a) & (c). If allowed to stand, the holding below sets a most dangerous precedent. Disputed facts will be arbitrarily determined by the trial court without regard to the role of the jury. Monetary sanctions will become the strategic ploy to avoid

unwanted jury trials. When noncompliance with court orders is alleged, the harshest of sanctions, involuntary dismissal, will be employed when a less severe sanction could be an adequate remedy. The undeniable right of any party in interest to challenge a bankruptcy trustee will be chilled and compromised. The potential for abuse of due process is enormous, and must be checked. Certiorari review is therefore essential to the administration of justice.

CONCLUSION

For the foregoing reasons, Petitioner R. David Legg asks that his petition for writ of certiorari be granted.

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APPENDIX A

In the Matter of UNITED MARKETS INTERNATIONAL, INC., Debtor.

W. Steve SMITH, Trustee, Appellee,

v.

R. David LEGG, Appellant.

No. 93-2613
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 28, 1994.

Pleadings filed by debtor's principal were struck, and principal was barred from filing further pleadings in proceedings until he paid more than $68,000 in sanctions previously entered against him, by the United States District Court for the Southern District of Texas, Norman W. Black, Chief Judge, and principal appealed. The Court of Appeals held that district court could strike pleadings filed by debtor's principal and bar him from filing further pleadings in proceedings brought against him by trustee in involuntary Chapter 11 case, until principal paid more than $68,000 in sanctions previously entered against him for vexatious litigation.

Affirmed.

1. Federal Civil Procedure key-1122, 1991

Federal district court has both specific and inherent power

to control its docket, and such power includes power to dismiss case, or counterclaim and cross-claim, as sanction for party's failure to obey court orders.

2. Federal Civil Procedure key-2820
Federal Courts key-813

Striking defendant's answer and denying request to replead as sanction is equally as harsh a sanction as dismissal of plaintiff s case with prejudice, and sanctions are reviewed by same standard; under such standard, involuntary dismissal of lawsuit will be upheld on appeal unless district court abused its discretion.

3. Federal Civil Procedure key-2820

Sanctions such as involuntary dismissal of suit are limited under district court's inherent power to instances of bad faith or willful abuse of judicial process.

4. Bankruptcy key-2187

District court could strike pleadings filed by debtor's principal and bar him from filing further pleading in proceedings brought against him by trustee in involuntary Chapter 11 case, until principal paid more than $68,000 in sanctions previously entered against him for vexatious litigation, even if principal were too poor to pay sanctions; if principal were as insolvent as he claimed, additional monetary sanctions would not be effective against him, and he would have no incentive to refrain from pursuing his frivolous counterclaim and cross-claims and forcing upon opponents to incur greater legal fees and costs.

5. Bankruptcy key-2187

Frivolous pursuit of cross-claim and counterclaims by

debtor's principal, who had been warned and sanctioned on numerous occasions, would not be further sanctioned by order barring acceptance of any further filing by principal; however, any future frivolous claims and appeals filed by him would be met with such remedy.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

This is an appeal of a "death penalty" sanction imposed by the district court on appellant R. David Legg. The district court struck Legg's pleadings and stayed him from filing further pleadings in the action until he pays the more than $60,000 in sanctions previously entered against him. We AFFIRM.

Facts and Procedural History

This consolidated case arose from the 1985 bankruptcy of United Markets International, Inc. ("UMI') -- of which Legg is the former president and sole shareholder -- and from numerous related lawsuits and adversary proceedings involving Legg.[1] The appellee in this case is W. Steve Smith, Trustee for the UMI bankruptcy estate.[2]

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[1]For clarity, this opinion will refer to the relevant cases by docket number. Legg is an attorney who has represented himself in most of these proceedings, although he has counsel for this appeal.

[2]We note that effective December 1, 1993, the bankruptcy court granted trustee Smith's "Motion to Substitute Counsel." Because Smith left the law firm of Woodward, Hall & Primm, P.C. in late 1993, he had requested authorization to substitute the "Law Offices of W. Steve Smith" as "counsel for the trustee" in place of Woodward, Hall & Primm, P.C. This authorization was

After several orders to consolidate and withdraw the reference[3], three bankruptcy adversary proceedings in the UMI bankruptcy were combined into one district court case, H-92-2141 in the Southern District of Texas, from which Legg now appeals. Case H-92-2141 includes adversary proceedings 85-0375, 85-0932 and 87-0866, as well as a district court sanction in CA-88-1958.[4] Because an understanding of these and other underlying lawsuits is necessary to a disposition of this appeal, the relevant cases are summarized below:

(1) Adversary Proceeding 85-0375,, *Smith v._Legg:* In this proceeding, Smith, the bankruptcy trustee, sued Legg on

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granted, and contrary to allegations raised by Legg in his supplemental Brief, the substitution of counsel does not "moot" anything or deprive Smith of his status as trustee.

[3]In the Southern District of Texas, pursuant to 28 U.S.C. 157(a), all cases related to a bankruptcy proceeding are automatically referred to the local bankruptcy court. However, regardless of the standing automatic reference of such matters to bankruptcy court, "the district court may withdraw ... any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." 28 U.S.C. 157(d). Thus the term "withdrawal of the reference," as used in this opinion, means that a district court entered an order effectively transferring a bankruptcy adversary proceeding from the bankruptcy court to the district court.

[4]The lawsuit docketed as H-88-1958 was filed by Legg against trustee Smith and several other parties, alleging racketeering, tortious interference with contract and intentional infliction of emotional distress, all in connection with a purported conspiracy of all the defendants in a scheme to destroy UMI. The district court dismissed Legg's complaint, entering judgment to that effect on January 31, 1989. One year later, Legg filed a Rule 60(b) motion to vacate the final judgment. The district court denied the motion. Legg appealed to the Fifth Circuit, and on March 25, 1991, we dismissed the appeal as "frivolous," ordering Legg to pay to each appellee their reasonable costs and attorneys' fees as damages. Upon our order, the trial court fixed such damages at $5,009.00 and ordered Legg to pay such amount to Smith as trustee. The $5,009.00 sanction order has not been paid and was one of the sanctions enforced in the order now being appealed.

behalf of the UMI estate to recover $300,000 that Legg had transferred from UMI to himself and used to purchase a high-rise condominium. The bankruptcy court: (a) found that Legg had breached his fiduciary duty by converting UMI's assets when UMI was insolvent with the actual intent to hinder, delay and defraud UMI's creditors;

(b) imposed a constructive trust on the condo in favor of the UMI estate;

(c) rendered judgment against Legg in favor of the UMI estate for more than $300,000;

(d) ordered Legg to turn over the condo and contents to trustee;

(e) ordered Legg to provide an accounting to the trustee for all UMI funds used by him; and

(f) found that Legg's homestead claim on the condo was subject to the estate's constructive trust.

Legg appealed, but the bankruptcy court's decision in 85-0375 was affirmed by the district court on January 31, 1992 and affirmed by this court on April 19, 1993. The reference was withdrawn in 1992 and what remained of 85-0375 -- basically the conclusion of the appeals and the enforcement of the judgment and order to account -was consolidated into H-92-2141 (the district court case now on appeal)[5].

(2) Adversary Proceeding 85-0932, *Legg v. Obaid, et. al* (This case was originally filed by Legg in district court but was removed to bankruptcy court as an adversary proceeding): In this proceeding, Legg sued seven creditors of

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[5]The judgment of $300,000 plus interest has not been paid. Smith stated in the June 25, 1993 hearing before the trial court that, with accrued interest, "the total is in excess of $400,000 at this time." In addition, as of the June 25, 1993 hearing, Legg had not yet complied with the order to account for any money he took from UMI.

UMI, attempting to challenge the validity of the creditors' $2 million in claims against the UMI estate, and thus attempted to challenge the validity of the March 28, 1985 Order of Relief granted in the main in bankruptcy case.[6] The bankruptcy court in 85-0932 dismissed Legg's suit against the creditors and (a) held that Legg was without standing to bring such claims because they belong to the UMI estate; (b) found that Legg knew full well when he filed the claims that they were improper and unauthorized; (c) noted that all Legg's claims "appear to be wholly without merit based on evidence previously presented to this court"; and (d) sanctioned Legg more than $63,000 under Federal Rule of Civil Procedure 11 for the creditors' incurred costs and fees because the lawsuit was "interposed for the unlawful purpose of harassing [the UMI creditors], causing delay and unnecessarily increasing the costs of litigation." Legg appealed, but the bankruptcy court's decision in 85-0932 was affirmed by the district court on March 12, 1990 and affirmed by this court on June 20, 1991. On June 25, 1993, the reference was withdrawn and what remained of the case -- the enforcement of the sanctions -- was consolidated into

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[6]The main UMI bankruptcy case, 85-00872-H2-5, was commenced on February 7, 1985 by the filing of an involuntary Chapter 11 petition by several of UMI's creditors. The creditors were granted an Order for Relief on March 28, 1985. The bankruptcy court found that Legg's attorney at the time consented to the bankruptcy court's order with Legg's knowledge and consent.

In yet another lawsuit, H-88-1706 in the Southern District of Texas, Legg attempted in 1988 to directly appeal the main bankruptcy case, claiming that the March 28, 1985 Order of Relief was a "fraud upon the Court." The district court on July 7, 1988 dismissed Legg's appeal as untimely, noting in addition that the appeal was meritless. Legg appealed to the Fifth Circuit, and on December 2, 1988, we affirmed, noting that "Legg's arguments supporting his belated appeal to the district court are so obviously without merit that we must warn him of the possibility that sanctions may be incurred if he pursues the filing of further frivolous pleadings or appeals in this court." Legg petitioned the United States Supreme Court for certiorari, which was denied.

H-92-2141 (the case now on appeal).[7]

(3) Adversary Proceeding 87-0866, *Smith v. Legg:* In this proceeding, the trustee Smith sought recovery from Legg of additional fraudulent transfers. Legg raised a statute of limitations defense to Smith's claims. Legg also asserted a counterclaim against Smith as trustee, seeking, *inter alia*, an accounting and claiming that the trustee appointment was void. Legg also asserted a cross-claim against Obaid, OBALCO and OTS (UMI creditors who were also defendants in Adversary 85-0932), claiming breach of a 1983 contract between OBALCO and UMI, tortious interference, emotional distress and "bad faith filing of their original involuntary [bankruptcy] petition [against UMI] . " On March 30, 1989, Legg was ordered by the bankruptcy court to pay Smith $400 as a sanction for failure to comply with discovery requests. In 1992, before any of the issues in the case were resolved, the reference for Adversary 87-0866 was withdrawn and the case was consolidated into the district court case docketed H-92-2141 (the consolidated case now on appeal).

In a hearing before the district court on June 25, 1993, Legg's original answer, counterclaim and cross-claims were struck by the district court as a sanction, and the court entered a written order to that effect on July 1, 1993. It is from that order that Legg now appeals. --

Events Surrounding the Striking of Legg's Pleadings

At the hearing on June 25, 1993, the trial court heard arguments from both Smith and Legg regarding Smith's

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[7]The $63,693.06 in sanctions -- which included $4,534.00 to Trustee Smith, $6,288.75 to Aegis Corporation and $52,870.31 to Essam Obaid, et. al., has not been paid and was one of the sanctions enforced in the order now being appealed.

"Motion For Enforcement of Court Orders."[8] After hearing arguments from both parties, the district court stated that Legg's arguments were unsupported by the record, adding that, "I certainly don't find Mr. Legg to be credible." The court granted Smith's motion to enforce the court orders, and made the following statements to Legg:

> **"It's not Mr. Smith that's making unsubstantiated allegations, it's you. I think you're living in a dream world. I don't think you've got any personal claim against these people. Any claim against these people belong[s] to UMI, and that's UMI sitting right over there, the trustee. You don't have any claim against Mr. Smith. Mr. Smith is trying to do his job despite the way you have handled everything in this case."**

The court denied Legg's motion for leave to file an amended counterclaim, and continued:

> **"I am striking your pleadings in this case, Mr. Legg, for failing to abide by the Court's sanctions. That is, this Court, the Bankruptcy Court and the Court of Appeals."**

Six days later, on July 1, 1993, the court entered a written order confirming its decision: "Mr. Legg's-pleadings in this matter are hereby STRICKEN for failure to pay the sanctions assessed against him. ... Mr. Legg is STAYED from

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[8]Smith's motion listed all the outstanding sanctions, orders and judgments against Legg and alleged that "Legg's cavalier attitude of unnecessary litigation, frivolous appeal and refusal to obey orders of this and various other courts should not be condoned." Smith moved the court to hold Legg in civil contempt, or alternatively, to dismiss Legg's counterclaim and cross-claims and deny any right of further appeal until Legg has complied with all court orders. The motion for enforcement had been on file for nearly two months before the hearing date, and Legg had ample opportunity to respond to the motion, both in writing and by oral argument to the court.

filing further pleadings in this matter until all sanctions assessed against him have been paid."[9]

The main consequence of the trial court's decision to strike Legg's pleadings was an involuntary dismissal of Legg's counterclaim against Smith and his cross-claims against the UMI creditors. Legg's answer was also struck by the district court, and Legg complains on appeal that he has been denied "the right to defend himself in an action initiated against him," meaning trustee Smith's allegations from bankruptcy adversary proceeding 87-0866 that Legg had made additional fraudulent transfers of UMI assets to himself.[10] However, our examination of the record in this appeal satisfies us that the "fraudulent transfer" claim brought by Smith against Legg in 87-0866 (which was later consolidated into H-92-2141) was waived by Smith in open court on June 25, 1993.

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[9]We note that in the hearing and subsequent written order, Legg was also threatened with civil contempt if he did not pay the sanctions or satisfy the court with proof that he was unable to pay them by a specified date. However, any contempt order was not made an issue on appeal and is therefore not before us. The appellate record does not reveal whether an order of civil contempt was ever issued. In the issues on appeal raised in Legg's brief (filed on October 28, 1993) as well as in the five issues listed in his separate "Statement of Issues on Appeal," filed on August 12, 1993, Legg complains only of the trial court's decision to strike his pleadings and refusal to allow him to replead until he pays the sanctions. Legg's main concern in this appeal appears to be what he calls a denial of access to the courts to pursue his claims. In all Legg's writings to this court -- including his "Supplemental Brief" filed on January 31, 1994 -- he never once raises as an issue on appeal any threat of or use of civil contempt by the district court. Therefore, we make no determination or comment in this opinion on whether civil contempt is or was appropriate in this case.

[10]Note that the "fraudulent transfer" claim in 87-0866 was separate from and in addition to the 85-0375 "fraudulent transfer" claims that were adjudged against Legg in the bankruptcy court in 85-0375 and were affirmed on appeal. The older 85-0375 claims resulted in a final order to account and a money judgment against Legg; these have not been satisfied and are still in effect. (See our previous discussion of Adversary Proceeding 85-0375).

Therefore, the affirmative relief awarded to trustee Smith in H-92-2141, which Legg appeals and which we affirm in this opinion, consists of:

(a) a final order enforcing the sanctions previously entered against Legg; (b) the striking of Legg's pleadings (resulting in the involuntary dismissal, or "death penalty sanction," of Legg's counterclaim against Smith and cross-claims against the UMI creditors); and (c) an order staying Legg from filing further pleadings in this action until all the sanctions against him are paid. We will review these orders for abuse of discretion.

[1-3] A federal district court has both specific and inherent power to control its docket, and this includes the power to dismiss a case (or here, a counterclaim and cross-claim) as a sanction for a party's failure to obey court orders.[11] Striking a defendant's answer and denying a request to replead is equally as harsh a sanction as dismissal of a plaintiff's case with prejudice, and the two sanctions are reviewed by the same standard.[12] We will uphold a district court's involuntary dismissal of a lawsuit unless the district court abused its discretion.[13] The Fifth Circuit has confined such sanctions under the district court's inherent power to instances of "bad

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[11] *Taylor v. Combustion Eng.*, 782 F.2d 525, 527-27 (5th Cir. 1986); *see also Natural Gas Pipeline Co. v. Energy Gathering,Inc.*, 2 F.3d 1397, 1406-07 (5th Cir. 1993) (noting that a federal district court's power to impose sanctions for bad-faith behavior during litigation is inherent and goes beyond powers granted by specific Federal Rules of Civil Procedure), *cert. denied sub nom.*, *Fox v. Natural Gas Pipeline Co.*, ___U.S.___, 114 S.Ct. 882, 127 L.Ed.2d 77 (1994).

[12] *Pressey v. Patterson*, 898 F.2d 1018, 1021 n.2 (5th Cir. 1990).

[13] *Frame V. S-H, Inc.*, 967 F.2d 194, 202 (5th Cir. 1992); *Price v. McGlathery*,792 F.2d 472, 474 (5th Cir. 1986)(no abuse of discretion found in involuntary dismissal of case when litigant had "a history of disobedience to this court's Orders").

faith or willful abuse of the judicial process."[14] We hold that Legg's behavior meets this standard.

[4] Despite being told by court after court that his allegations were meritless and frivolous, and despite being sanctioned more than $68,000 due to his frivolous claims and appeals, Legg continued to abuse the judicial process by pursuing claims that he knew belonged to the UMI estate, claims that he has repeatedly failed to document, and/or claims that have been previously litigated, have been adjudged against him, and have been upheld on appeal. Legg's counterclaim and cross-claims that were struck by the trial court below fit into these categories. We note that the same trial judge who struck Legg's pleadings below had heard the majority of prior appeals in the UMI bankruptcy proceeding and therefore had a close familiarity with the relevant issues and the disposition of past cases involving Legg. Immediately before striking Legg's pleadings, the district court stated that Legg has no personal claim against the UMI creditors, and that if any claim exists, it belongs to the UMI estate and can only be pursued by the trustee. The court also stated that Legg had no claim against Smith as trustee. Legg's claim against Smith was based solely on a challenge to the bankruptcy Order of Relief and the order appointing Smith as trustee, both of which have been separately challenged and affirmed on appeal. Legg acknowledged in his motion for leave to replead that the adverse disposition of his many appeals has altered his standing to bring his counterclaim and cross-claims. Smith contends, and we agree, that even before Legg's claims in H-92-2141 were struck, those claims were already either moot or meritless. He has brought the same claims before court

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[14] *Pressey,* 898 F.2d at 1021; *See also E.E.O.C. v. General Dynamics,* 999 F.2d 113, 119 (5th Cir. 1993) (noting that the "death penalty" sanction of striking pleadings is appropriate "only under extreme circumstances" such as willfulness or bad faith).

after court and has had them adjudged against him on each occasion.

We note additionally that Legg in his appellate brief attempts, again, to dredge up and re-litigate these old contentions -- for example, his own culpability for converting UMI assets (already decided in 85-0375 and affirmed on appeal), and the validity of the claims filed by the UMI creditors (85-0932 determined emphatically that Legg has no standing to bring these claims, and any new challenge to the disposition of the main bankruptcy case is untimely. See footnote 6). Legg appears to believe that if he is allowed to present these meritless claims before a jury, somehow he will be vindicated. He states in his Reply Brief that "the jury may well decide that Obaid's claims are false, that Smith has breached his fiduciary duty, and that Legg has been the aggrieved party all along." Such frivolous arguments amply support the trial court's observation that Legg "is living in a dream world." We take Legg's past lack of success in the federal courts into account in assessing his credibility in the case before us. *Moody v. Miller,* 864 F.2d 1178, 1179 n.1 (5th Cir. 1989). Our statement describing the sanctioned litigant in *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1034 (5th Cir. 1990), is equally applicable to Legg:

"Like any litigant, [Legg] was entitled to his day in court. But he was not entitled to use his special skills and his knowledge as an attorney to maneuver this suit to his advantage, and to defy the orders of the court designed to advance its resolution."

Id. at 1034 (affirming involuntary dismissal sanction for attorney litigant who refused to obey court orders or pay a previously imposed sanction) . Legg cannot complain of "denial of access to the courts" after he has abused the court system time and time again and has failed to comply with

numerous court orders.[15] "We can ill afford to permit litigants to waste scarce court resources with disingenuous or frivolous arguments and-motions asserted purely to hinder and delay the efficient operation of justice." *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1487 (5th Cir. 1990) (holding that party's "bad faith and callous disregard of [his] responsibilities" justified court's striking of pleadings and entry of default judgment against him).

Legg complains that the trial court erred by striking his pleadings for failure to pay the sanctions without holding a factfinding hearing and making written findings on the issue of Legg's financial inability to pay. Legg claims that he is too poor to pay the sanctions, and that therefore the court's order enjoining him from filing further pleadings until the sanctions are paid has "wrongly precluded Legg from access to the courts, and constituted a denial of due process." Legg's claimed inability to pay is not established in the appellate record before us, and even if it were established, that would not in all cases preclude the court's order. This Circuit has previously affirmed and employed similar sanctions against

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[15]The court's written order premises its decision on Legg's "failure to pay the sanctions assessed against him." However, the court at the June 25, 1993 hearing indicated to Legg that he was also being held accountable for his general pattern of behavior during the litigation surrounding the UMI bankruptcy, for example, his continuing to pursue his meritless claims and not complying with other court orders. During the hearing, in the context of striking Legg's pleadings and threatening to hold him in contempt, the judge made these statements to Legg: "There's a judgment against you that you haven't paid"; "Mr. Smith doesn't want anything from you except an accounting"; "I want you to cooperate and give the information to Mr. Smith. If the money that was taken out of UMI was spent, tell him where it was spent. If it wasn't taken out, show him why it wasn't taken out. Isn't that simple enough? ... Let's get this thing over with." "(It's you] that's making unsubstantiated allegations"; "I don't think you've got any personal claim against these people"; "You don't have any claim against Mr. Smith. Mr. Smith is trying to do his job despite the way you have handled everything in this case."

"vexatious and harassing litigants." *Gelabert v. Lynaugh,*894 F.2d 746, 748 (5th Cir. 1990) ; *cf. Sassower v Mead Data Cent.,Inc.,* 114 S.Ct. 4, 5 (1993); *Day v. Day,*_114 S.Ct. 4, 5 (1993). In Gelabert, a federal district court sanctioned a prisoner litigant for court costs and further "forbade the clerk of court to accept for filing any further lawsuits on behalf of Plaintiff until the sanction is satisfied." Gelabert complained that he was too poor to pay the sanction and would never be able to pay it as long as he remained in prison; We affirmed, holding that inability to pay is no reason to overturn the sanction:

> "Like any other pastime, recreational litigation has its price; such sanctions as this are imposed for the very purpose of causing the would-be pro se prisoner litigant, with time on his hands and a disposition to retaliate against the system, to think twice before cluttering our dockets with frivolous or philosophical litigation."

Gelabert, 894 F.2d at 748; *See also Moody v. Miller,* 864 F.2d 1178, 1179 n.2 (5th Cir. 1989) (noting Fifth Circuit's decision to prohibit frivolous litigant "from prosecuting any more IFP appeals, absent certification of his good faith by the district court, until he paid the sanctions in six of these cases."). If Legg is insolvent as he claims, then additional monetary sanctions will not be effective against him, and he has no incentive to refrain from pursuing his frivolous counterclaim and cross-claims and forcing his opponents to incur greater and greater legal fees and costs. The court's order precluding further pleadings until the sanctions are paid is appropriate in this context.

"Courts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender."

Waffenschmidt v. Mackay, 763 F.2d 711, 716 (5th Cir. 1985), *cert. denied* sub nom., *Currey v. Waffenschmidt,*474 U.S. 1056 (1986).

We therefore AFFIRM the district court's order striking Legg's pleadings and staying Legg from filing further pleadings in this
action until he pays the sanctions previously entered against him.

The following is a list of the sanctions Legg must pay before the stay will be lifted:[16]

(1) $400.00, ordered by the bankruptcy court in Adversary Proceeding 87-0866 on March 30, 1989;

(2) $4,534.00, ordered by the bankruptcy court in Adversary Proceeding 85-0932 on February 14, 1989;

(3) $6,288.75, ordered by the bankruptcy court in Adversary Proceeding 85-0932 on February 14, 1989;

(4) $52,870.31, ordered by the bankruptcy court in Adversary Proceeding 85-0932 on February 14, 1989;

(5) $5,009.00, ordered by a district court in Civil Action H-88-1958 on December 6, 1991.

[5] Smith urges us to take further action against Legg, arguing that a court may structure the sanctions necessary

---

[16]We note that there may be other sanction orders, judgments and orders to pay costs now existing and in effect against Legg. Our opinion today does not alter Legg's already existing obligation to obey orders issued by any court or to pay any judgments or sanctions that might be outstanding. The sanctions listed herein, however, are those that we can identify as being referred to by the district court order which we affirm in this opinion.

or warranted to control its docket, to maintain the orderly administration of justice or to enforce its orders, and he cites *Vinson v. Heckmann*, 940 F.2d 114, 116-17 (5th Cir. 1991). In Vinson, we affirmed the dismissal of a 42 U.S.C. § 1983 suit found to be frivolous by the district court. Id. at 115. In addition, we noted that Vinson, like Legg in this case, had been warned and sanctioned both by district courts and appellate courts on numerous occasions because his filings were frivolous, and that Vinson had been warned that more severe sanctions would be imposed if he filed any more frivolous actions. We then *sua sponte* ordered a more stringent sanction on Vinson, directing all trial and appellate courts within our supervisory jurisdiction to decline -acceptance of any filing by Vinson unless he obtained specific pre-authorization by a judge of the forum court. *Id.* at 116-17.

We decline at this time to extend Vinson-type sanctions to Legg in this appeal, but we take this occasion to warn Legg that any future frivolous claims and appeals filed by him or on his behalf will be met with that remedy.

TRIAL COURT ORDER AFFIRMED.

APPENDIX B

U.S. Court of Appeals
FILED
JAN 24 1994
Charles R. Fulbruge III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2613
Summary Calendar

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
Debtor.

W. STEVE SMITH, Trustee
Appellee.

versus

R. DAVID LEGG,
Appellant,

Appeal from the United States District Court for the Southern District of Texas
ORDER:

IT IS ORDERED that appellant's motion for leave to file supplemental brief is GRANTED.

/s/ Harold R. Demoss, Jr.
UNITED STATES CIRCUIT JUDGE

APPENDIX C

/s/ 43
United States District Court
Southern District of Texas
ENTERED
JUL 01 1993
Michael N. Milby, Clerk
By Deputy: /s/L.Anderson

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	*	
UNITED MARKETS	*	CIVIL ACTION NO.
INTERNATIONAL,	*	H-92-2141
	*	BANKRUPTCY NO.
Debtor.	*	85-00872

ORDER

A motion hearing was held on June 25, 1993 at which time the Court heard oral argument on all pending motions. This order reiterates the rulings that were made on the record. It is

ORDERED that David Legg's motion to recuse W. Steve Smith, Trustee (entry 6) is DENIED. It is further

ORDERED that W. Steve Smith's motion for enforcement of court orders (entry 11) is GRANTED. Mr. Legg's pleadings in this matter are hereby STRICKEN for failure to pay the sanctions assessed against him. Mr.

Legg has until August 2, 1993 to pay all sanctions previously imposed against him or to satisfy the Court that he has no ability to pay. If Mr. Legg fails to comply with this order he will be held in civil contempt. It is further

ORDERED that entries 14-1, 14-2, 15, 21, 23, 27, 29, 30 and 32 are MOOT as all pleadings filed by Mr. Legg are STRICKEN. It is further

ORDERED that Mr. Smith's motion for a hearing (entry 16) and motion for a conference (entry 24) as well as his motion for a protective order (entry 24) are also MOOT. It is further

ORDERED that Mr. legg is STAYED from filing further pleadings in this matter until all sanctions assessed against him have been paid.

IT IS SO ORDERED.

Signed this 29th day of June, 1993 at Houston, Texas.

/s/ Norman Black
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

In Re:
UNITED MARKETS INTERNATIONAL, Inc.

Debtor.

United States District Court
Southern District of Texas
ENTERED
JUL 20 1992
Jesse E. Clark, Clerk
By Deputy:

H-92-2141

W. STEVE SMITH,
Trustee

versus

R. DAVID LEGG, et al.

Civil Action MBH-92-18

Case 85-00872

Adversary 87-866

ORDER WITHDRAWING REFERENCE

The reference to the United States Bankruptcy Court for the Southern District of Texas, Houston Division, is withdrawn, and the case shall be randomly assigned.

Signed on July 20, 1992, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	*	
UNITED MARKETS	*	**C.A. NO. H-92-2141**
INTERNATIONAL, INC.,	*	
Debtor.	*	

R. DAVID LEGG,	*	**ADVERSARY NO. 85-0932**
individually and	*	
derivatively as the	*	
sole shareholder of	*	
UNITED MARKETS	*	
INTERNATIONAL, INC.	*	
	*	
V.	*	**/s/ 42**
	*	**United States**
	*	**District Court**
ESSAM OBAID, TAHER	*	**Southern District**
OBAID, KAHIL AWAD,	*	**of Texas**
OBAID & ALMULLA	*	
CONSTRUCTION COMPANY,		
LTD., a/k/a "OBALCO",	*	**ENTERED**
BASSIM FAROUKI,	*	**JUN 29 1993**
DYNASYSTEMS CORP.,	*	
C.D. (JACK) GILKEY,	*	**Michael N. Milby,**
AEGIS CORPORATION	*	**Clerk**
and UNITED MARKETS	*	**By Deputy:**
INTERNATIONAL, INC.	*	**/s/L.Anderson**

ORDER WITHDRAWING REFERENCE AND OF CONSOLIDATION

Came on for consideration the Motion to Withdraw the Reference on Adversary No. 85-0932 to Consolidate with C.A. No. H-92-2141, and good cause being shown therefor and the Court considering the Recommendation of R.F. Wheless, U.S. Bankruptcy Judge, dated June 2, 1993, regarding this Motion. it is

ORDERED that the reference of Adversary No. 85-0932 to the United States Bankruptcy Court for the Southern District of Texas be, and is hereby, withdrawn and is assigned to United States Chief District Judge Norman W. Black for adjudication as part of and consolidated into C.A. No. H-92-2141.

DATED: /s/ June 25, 1993

/s/ Norman Black
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-6019

Summary Calendar

IN RE: UNITED MARKETS INTERNATIONAL, INC.,
Debtor.

R. DAVID LEGG,
Appellant,

versus

ESSAM OBAID, ET AL.,
Appellees.

Appeal From the United States District Court
for the Southern District of Texas
(CA-H-89-3093)

August 28, 1991

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:[1]

---

[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and

The application for rehearing is denied. However, the opinion is amended to read as follows:

R. David Legg is the former president and sole shareholder of United Markets International, Inc. On petition by several of its creditors, UMI was ordered into Chapter 11 by a federal bankruptcy judge in 1985. Legg thereafter filed multiple suits in bankruptcy court and federal district court--on his own behalf and, ostensibly, on behalf of UMI--challenging the propriety of the relief order and averring various causes of action against the creditors. These suits were repeatedly dismissed, but as Legg persisted he was ultimately sanctioned by the bankruptcy court under Federal Rule of Civil Procedure 11 and corresponding Bankruptcy Rule 9011. On review, a federal district court upheld the sanctions. Legg now appeals to this court. We also affirm.

I.

The circumstances of UMI's demise are only tangentially related to this appeal. It is enough to note that UMI was a Texas corporation doing business with certain Saudi Arabian concerns, including the Obaid and Amulla Construction Company (OBALCO). OBALCO and other creditors of UMI petitioned a federal bankruptcy court to institute involuntary Chapter 11 relief, which it did on March 28, 1985, after Legg's attorney joined in a consent decree.

In May 1985 Legg commenced an adversary proceeding in bankruptcy court. He filed the suit in his name and derivatively on behalf of UMI. The complaint named various Saudi Arabian defendants and others, and raised

---

burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

assorted claims, including conversion, breach of contract, tortious interference, and breach of fiduciary duty. A number of the defendants moved to dismiss the complaint, as did UMI's court-appointed trustee, Steve Smith. Smith opposed Legg's complaint on the grounds that as trustee he alone had standing to assert causes of action on behalf of UMI and that Legg had not met the necessary prerequisites for a derivative suit. The bankruptcy court dismissed this adversary proceeding on July 30, 1985. No appeal was taken.

In September 1985 Legg, individually, and derivatively on behalf of UMI, filed a new complaint in federal district court. The complaint asserted causes of action identical to those dismissed by the bankruptcy court; although, certain parties were dropped as defendants and UMI was added as a defendant. This proceeding was removed to bankruptcy court in November 1985, and thereafter the defendants, including Smith, moved for dismissal and for sanctions against Legg and his attorney, Gerald P. DeNisco. The bankruptcy court entertained numerous motions by Legg, and granted Legg leave to file an amended complaint, in which he asserted an additional cause of action under the Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. On January 22, 1986, however, the bankruptcy court dismissed the case. Legg did not appeal.

In September 1986 the bankruptcy court heard arguments from the parties on defendants, earlier motion for sanctions. The defendants had abandoned their claim for sanctions against Legg's attorney, DeNisco, who by this time had withdrawn from the case. As to Legg, the bankruptcy judge concluded that sanctions were appropriate but postponed determination until a later date. On February 13, 1989, after further hearings on the appropriate measure of sanctions, the bankruptcy court ordered Legg to pay $64,000 to the various

defendants, representing all reasonable and necessary costs and fees incurred as a result of Legg's prosecution of the adversary suit and subsequent civil complaint. The bankruptcy court found in its order that Legg "knew he had no standing" to initiate these actions and that he

> **should be sanctioned . . . for the filing and prosecution of such actions, as such actions were not well grounded in fact, not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and further, that such actions were interposed for the improper purpose of harassing Movants, causing delay and unnecessarily increasing the costs of litigation.**

Legg appealed to the district court. Without a hearing, the district court affirmed the sanctions by written order entered on March 7, 1990. The court's order reviewed the course of this litigation, including Legg's appeals of the bankruptcy court's initial order of relief:

> **Since the final Order of Relief was entered Appellant Legg has filed two suits in federal district court and a plethora of actions in both the district and bankruptcy courts in an attempt to circumvent Judge Wheless's Order of Relief. As early as January 22, 1986 Judge Wheless, in his dismissal of one of the suits removed to his court, admonished Appellant and his counsel for bringing meritless claims. He threatened to impose sanctions if they continued to pursue such claims.**
>
> **However, this did not dampen the enthusiasm of Appellant Legg who continued to plague the Court with additional causes of action. On May 5, 1988 Appellant filed an appeal of the March 28, 1985 final**

Order of Relief, which was dismissed on July 7, 1988 by District Court Judge Norman Black for being untimely. The Fifth Circuit Court of Appeals affirmed on December 2, 1988. Again, Appellant Legg was admonished for his meritless claim and was threatened with sanctions. A second District Court suit, this one including RICO allegations, was dismissed by Judge David Hittner on December 12, 1988.

On October 23, 1990 the district court denied Legg's motion for reconsideration; whereupon, he took this appeal.

II.

Legg raises myriad issues on appeal from the district court's order affirming the sanctions imposed by the bankruptcy court. He challenges the jurisdiction of the bankruptcy court to order sanctions, the appropriateness of the sanctions imposed, the validity of the district court's review of the sanctions, the soundness of the district court's denial of his motion to supplement the record, and the constitutionality of Federal Bankruptcy Rule 9011. We address each of these issues in turn.

A.

Legg contends that the initial removal to the bankruptcy court was improper because his suit encompassed private law causes of action that could not have been raised in the first instance in that court. Next, he argues that even if the bankruptcy court could properly assert jurisdiction, it did not possess the authority to enter a final order awarding sanctions. Neither argument is sustainable.

Legg's first argument necessarily assumes that the claims he raised initially in the district court were personally his,

not UMI's. But this is not the case. Seven of the eight causes asserted in his complaint seek redress for damages sustained by the corporation.[2] Legg argues that Smith, as trustee for UMI, abandoned these claims in open court. But we are not convinced he did; in fact, we observe that UMI is currently proceeding against certain of the defendants in bankruptcy court. However, even if Legg is correct in making this assertion, UMI's abandonment of a legal claim does not constitute an assignment of that claim to Legg. He therefore had no standing to raise these claims.

Legg's second argument rests on the proposition that a proceeding under Rule 11 or Bankruptcy Rule 9011 is a "non-core" proceeding. As Legg points out, 28 U.S.C. § 157(c)(1) provides that a bankruptcy judge may under some circumstances hear a "non-core" proceeding, but in such case he "shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district court after considering the bankruptcy judge's proposed findings and conclusions." The flaw in Legg's argument is that it considers the court's sanctions order in isolation from the issues raised in the underlying complaint. Those issues-conversion, breach of contract, tortious interference, breach of fiduciary duty--are undoubtedly core issues as they pertain to the administration of the bankrupt estate. Section 157(b)(1) specifies that in any core proceeding a bankruptcy judge may "enter appropriate orders and judgments." We understand this language to

---

[2]Only the claim for intentional infliction of emotional distress was personal to Legg. The other six causes raised before the district court were properly referred to the bankruptcy court pursuant to 28 U.S.C. § 157. We need not consider the status of the claim for intentional infliction of emotional distress here because Legg challenges only the order affirming the sanctions imposed by the bankruptcy court.

empower the bankruptcy court to issue final orders of sanctions under Rule 11 and Bankruptcy Rule 9011.

Relatedly, Legg complains that the district court erred by not conducting a trial *de novo* on review from the bankruptcy court. This argument also stems from the erroneous contention that this case was a non-core proceeding under § 157(c)(1). Section 157(b)(1) provides that bankruptcy judges may hear all core cases and "may enter appropriate orders and judgments, subject to review under section 158 of this title." Section 158 contemplates an appeal "taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts"--not a trial *de novo*.

B.

Legg questions the propriety of the bankruptcy court's sanctions order. First, he argues that the court's order was vague and did not adequately support the sanctions award with findings of fact. This court has avoided a rule that would impose on lower courts "the onerous and often time-consuming task of making specific findings and conclusions in all Rule 11 cases." *Thomas v. Capital Sec. Services* Inc., 836 F.2d 866, 883 (5th Cir. 1988)(en banc). Rather, we have emphasized the importance of an adequate record for appellate review, implying a greater need for express findings in those cases in which "the violation is not apparent from the record and the basis and justification for the trial judge's Rule 11 decision is not readily discernable." *Id.* The bankruptcy court's findings are set out above; in light of the record as a whole, we deem these findings more than adequate to withstand Legg's attack.

Legg also contends that the amount of sanctions awarded

was excessive to the point of being punitive, not rehabilitative or educational. We apply an abuse of discretion standard of review in assessing a lower court's imposition of sanctions under Rule 11. *Id.* at 866. We have no basis to conclude that the amount awarded in sanctions by the bankruptcy court in this case constitutes anything other than a reasonable exercise of discretion. This amount represented an accumulation of the defendants, combined attorney's fees incurred in defense of Legg's legal actions. We also have no reason to conclude that the bankruptcy court abused its discretion by not discounting the sanctions award to reflect the defendants, failure to mitigate damages. The record makes clear that it was Legg, not the defendants, who persistently prosecuted and prolonged this litigation.

Finally, contrary to the position espoused by Legg, the fact that these sanctions were imposed against him as a litigant, not an attorney, is unexceptional. Both Rule 11 and Bankruptcy Rule 9011 expressly allow sanctions to be imposed against the represented party in an appropriate case.

C.

As Legg points out, this court recently granted his unopposed motion, under Federal Rule of Appellate Procedure 10(e), to supplement the record with the transcripts of three bankruptcy court hearings, which he claims were omitted from the record due to clerical error. Legg argues that the district court erred in denying his motion to supplement the record below.

He also argues that the district court was in error by not ordering sua sponte that these transcripts be added to the record. According to Legg, these transcripts were essential to assessing whether he should have been sanctioned. We disagree. The basis for the bankruptcy court's decision to

impose sanctions on Legg was apparent from the record submitted to the district court. As for the district court's denial of Legg's motion to supplement, we need only note that Rule 10(e) commits these matters to the discretion of the court. We find no abuse of that discretion by the district court.

D.

Finally, on appeal Legg asserts that Federal Bankruptcy Rule 9011 is unconstitutional to the extent that it empowers federal bankruptcy courts to impose Rule 11 sanctions. Because Legg did not raise this claim below, we cannot now consider it on appeal. *McLean v. International Harvester* Co., 902 F.2d 372, 374 (5th Cir. 1990).

AFFIRMED.

APPENDIX G

RELEVANT PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AND AMENDMENTS THERETO, UNITED STATES CODE, FEDERAL RULES OF APPELLATE PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF BANKRUPTCY PROCEDURE

THE CONSTITUTION OF THE UNITED STATES:

ARTICLE I

SECTION 1- All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

SECTION 8- (1) The Congress shall have the power--

* * *

(4) To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

* * *

(9) To constitute tribunals inferior to the Supreme Court;

* * *

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

* * *

ARTICLE III

SECTION 1- The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2- (1) The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;-to all cases affecting ambassadors, other public ministers and consuls;-to all cases of admiralty and maritime jurisdiction;-to controversies to which the United States shall be a party;- to controversies between two or more States;-between a State and citizens of another State;- between citizens of different States;- between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

(2) In all cases affecting ambassadors, other public ministers and consuls, and those in which a State

shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both of law and fact, with such exceptions, and under such regulations as the Congress shall make.

* * *

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

* * *

UNITED STATES CODE PROVISIONS:

TITLE 11

BANKRUPTCY CODE

SECTION 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

SECTION 1927. Counsel's liability for excess costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

FEDERAL RULES OF APPELLATE PROCEDURE

RULE 38. If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that the purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

RULE 12. Defenses and Objections-When and How Presented-By Pleading or Motion-Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:...

> **(6) Failure to state a claim upon which relief can be granted,...**

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse part may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of a pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RULE 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of

an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render judgment until the close of all evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

RULE 9011. Signing and Verification of Papers

Every petition, pleading, motion or other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, statement of financial affairs, statement of executory contracts, statement of intention, Chapter 13 Statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the document; that to the best of the attorney's or party's knowledge, information, and belief

formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay or to increase the cost of litigation. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of filing of the document, including a reasonable attorney's fee.

Supreme Court, U.S.
FILED
SEP 26 1994
OFFICE OF THE CLERK

No. 94-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.
DEBTOR.

R. DAVID LEGG
PETITIONER,

VERSUS

W. STEVE SMITH, TRUSTEE,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. STEVE SMITH
COUNSEL OF RECORD
FOR RESPONDENT
910 LOUISIANA STE. 400
HOUSTON, TEXAS 77002
(713) 227-2525

SEPTEMBER 25, 1994

BEST AVAILABLE COPY

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QUESTIONS PRESENTED

In response to the questions presented by Petitioner, a number of "facts" included therein do not exist or are misstated. Rather than attempt to rephrase the questions, these misstatements will be pointed out in the following sections.

NO. 94-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.
Debtor.

R. DAVID LEGG
Petitioner,

versus

W. STEVE SMITH, Trustee,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

R. David Legg ("Legg") has been afforded every bit of due process, and then some, as he has appeared continually before the Bankruptcy Court since the commencement of the involuntary bankruptcy case of United Markets International, Inc. ("UMI") on February 7, 1985, and as he has appeared at the District Courts and the Fifth Circuit Court of Appeals on

numerous appeals and as he has earlier sought certiorari and stay in this Court. It is not, as Legg would have this Court believe, a conspiracy of W. Steve Smith, Trustee ("Trustee") who Legg unsuccessfully tried to remove, the judges who Legg unsuccessfully tried to recuse, and others; it is simply a question of when is enough.

An agreed Order for Relief was entered on March 28, 1985 in the UMI bankruptcy case. Legg subsequently appealed the Order for Relief at the District Court and Circuit Court level because Trustee was pursuing him in Adversary No. 85-0375 to recover over $300,000 of UMI funds taken by Legg on the eve of bankruptcy. Both Courts upheld that Order for Relief. Legg then began an attack on the Order for Relief under Fed.R.Civ.P. 60(b), but it was denied at the bankruptcy, district and appellate court levels, and the Supreme Court denied cert. (No. 92-810). The significance of the sanctity of the Order for Relief is that its invalidity was the sole basis for Legg's pleadings against Trustee and Essam Obaid ("Obaid"), Obaid & Almulla Construction Co., Ltd. ("OBALCO") and Obaid Technical Services Co., Ltd. ("OTS") in Civil Action No. H-92-2141 which was struck by the sanctions order. With the Order for Relief's validity, Legg has no standing, Legg has no claims and his pleadings failed.

The administration of this case has been a long ordeal. Its length has been caused by Legg. The attacks on the jurisdiction conferred by the Order for Relief did not cease until over seven years into the case when the Supreme Court denied cert. The initial meeting of creditors was held up for years because of Legg's breach of agreements and then

violations of Court orders directing him to file the required schedules, statement of affairs and list of creditors for UMI (Legg is the sole stockholder, officer and director of UMI). Legg refused to account for the money he took out of UMI (which was subsequently addressed in Adversary Proceeding No. 85-0375 and in Adversary Proceeding No. 87-0866 by Trustee). When judgment against Legg for the misappropriation of UMI's money and for constructive trust upon his highrise condominium in Adversary Proceeding No. 85-0375 was entered in excess of $400,000.00, he appealed every aspect thereof.

When ordered to provide documentary proof of the unsubstantiated claims of UMI against Trustee and the bankruptcy petitioning creditors, filed by him twice in the federal court system and twice dismissed, he refused. Faced with the choice of abandonment of these claims (which would go to UMI and thereby Legg) or prosecution, Trustee commenced Adversary Proceeding No. 87-0866 against Obaid, OBALCO and OTS. Trustee was satisfied with the validity of those claims asserted by those creditors - there was no viable documentation presented to the contrary, only the unsubstantiated, wild allegations of Legg. Trustee commenced that adversary against Obaid, OBALCO and OTS to preserve whatever defenses or objections might be subsequently documented by Legg, if at all, as he had been ordered to do. Legg was also sued by Trustee in that adversary proceeding for a further accounting of funds taken from UMI (although that was ordered of Legg in Adversary Proceeding No. 85-0375 as well).

The monetary sanctions in question arose from three separate proceedings or actions:

(1) Adversary Proceeding No. 85-0932. An Order was entered dated February 14, 1989 by the Bankruptcy Court against Legg for sanctions in favor of (a) Aegis Corporation for $6,288.75; (b) Trustee for $4,534.00; and (c) Obaid, Taher Obaid, Khalil Awad, OBALCO, Bassim Farouki, Dynasystems Corporation and C.D. (Jack) Gilkey for $52,870.31. The award order was affirmed on appeal by both the District Court and the Fifth Circuit Court.

(2) Adversary Proceeding No. 90-2548. In its Order of May 8, 1991, the Fifth Circuit Court determined:

> The appeal [of the District Court's denial of his Fed.R.Civ.P. 60(b) Motion] is frivolous.
>
> . . . Legg is ordered to pay each appellee as damages the reasonable attorney's fees expended in briefing this appeal and all costs duly taxed. If the parties are unable to agree on the amount of such fees, the district court is directed to fix the same.

Agreement was not reached. The District Court, by its Order entered December 6, 1991, ordered Legg to pay Trustee $5,009.00.

(3) Adversary Proceeding No. 87-0866. On March 30, 1989, the Bankruptcy Court ordered Legg to pay to Trustee, within fourteen days, $400.00 in costs.

It is significant that on still another, earlier occasion, Legg was warned of the potential for sanctions. By Per Curium Opinion dated December 2, 1988 in Cause No. 88-2721, the Fifth Circuit Court observed:

> Legg's arguments supporting his belated appeal to the district court are so obviously without merit that we must warn him of the possibility that sanctions may be incurred if he pursues the filing of further frivolous pleadings or appeals in this court.

None of the sanctions have been paid.

Before the District Court in Civil Action No. H-92-2141, in addition to the various sanctions orders, were the two adversary proceedings, or what remained of the two adversary proceedings, withdrawn from the Bankruptcy Court. Adversary Proceeding No. 85-0375 was the proceeding commenced by Trustee against Legg to recover $300,000.00 Legg had transferred from UMI to purchase a highrise condominium. The Bankruptcy Court found that Legg had breached his fiduciary duty by converting UMI's assets when UMI was insolvent, with the actual intent to hinder, delay and defraud UMI's creditors. Judgment was rendered against Legg for more than $300,000.00. A constructive trust was imposed on the highrise condominium in favor of the estate and Legg

was ordered to turn over the condominium to the Trustee. Also, Legg was ordered to provide an accounting to Trustee for all of UMI's funds used by him. These various orders were appealed by Legg, but affirmed by the District and Circuit Courts.

In Adversary Proceeding No. 87-0866, Trustee sought recovery from Legg of additional fraudulent transfers. It is in this adversary proceeding that Trustee also brought suit against Obaid, OBALCO and OTS to preserve whatever cause alleged by Legg as a defense to the claims asserted against the estate might be documented. Legg counterclaimed against Trustee for damages because of the invalidity of the Order for Relief and resulting trustee appointment order. Legg also asserted cross-claims against Obaid, OBALCO and OTS claiming, among others, breach of a 1983 contract between OBALCO and UMI, tortious interference, emotional distress, bad faith and the like.

Various motions were filed by Trustee and Legg in Civil Action No. H-92-2141. These included the Trustee's Motion for Protective Order, wherein Trustee re-urged his long pending Motion to Dismiss the counterclaim of Legg against him and the long pending Motion to Strike, Dismiss and for Sanctions filed by Obaid, OBALCO and OTS, to both of which Legg had filed no answer. [The counterclaim of Legg against Trustee is premised entirely upon Legg's allegation that the Order for Relief and the Consent to Entry of Order for Relief and Appointment of Trustee are void. Based upon that alleged voidness, Legg demands of the Trustee an accounting and return of all assets "wrongfully appropriated" by Trustee and

for damages of $5,750,000.00.] Also, there was pending the Trustee's Motion for Enforcement of Court Orders and the Trustee's Supplement thereto. There were a number of other motions pending by both Legg and Trustee. The most telling by Legg was his Motion for Leave to File First Amended Answer, Counterclaim and Cross-Claim. Opposition was interposed because it sought to expand the counterclaim against non-parties, W. Steve Smith, in his personal as opposed to trustee capacity, and Trustee's counsel, neither of which were parties to the adversary proceeding, because totally new grounds were being asserted on which limitations had run and because Legg had no standing to pursue such causes.

All motions were set for hearing on June 25, 1993. The Motion for Enforcement of Court Orders was granted. Legg's Motion to Recuse Trustee was denied. Legg's pleadings were stricken for failure to pay the sanctions assessed against him. Legg was given until August 2, 1993 "to pay all sanctions previously imposed against him or to satisfy the Court that he has no ability to pay. If Mr. Legg fails to comply with this Order, he will be held in civil contempt."

Legg failed to pay and failed to satisfy the Court that he had no ability to pay the sanctions by August 2, 1993. Rather, he filed a self-serving Affidavit on August 2, 1993 (not explaining its lateness or even seeking a hearing to attempt to satisfy the Court) and he filed a Notice of Appeal of the Court's Order on August 2, 1993. Trustee moved for entry of an Order of Civil Contempt on the grounds that the sanctions had not been paid and that Legg had failed to establish his inability to pay. The Affidavit that was submitted on

August 2, 1993 failed to meet any standards which would aid the Court in determining his indigence. Hearing was held on August 30, 1993. His counsel, but not Legg appeared. Hearing was set on the contempt motion for September 10, 1992. All parties were ordered to be present. Legg filed a Petition for Writ of Mandamus with the Fifth Circuit Court of Appeals seeking to recuse the District Court Judge from ruling on further matters. That Petition was denied by the Fifth Circuit on September 9, 1993. On September 10, 1993, the date of the hearing, Legg filed an Emergency Application for Stay with the United States Supreme Court until the denial of writ of mandamus by the Fifth Circuit could be reviewed by the United States Supreme Court. Legg failed to attend the contempt hearing as ordered. The Court entered an Order of Civil Contempt based upon Legg's failure to abide by the first Order, to pay the sanctions or to satisfy the Court that he had no ability to pay, by August 2, 1993, and upon the Court's second order to personally appear at the hearing on September 10, 1993, and an Order remanding Legg to the custody of the United States Marshal. A bench warrant for his arrest was issued. Efforts to enforce that Order by the Marshals have been unsuccessful.

RESPONSE TO REASONS ASSERTED BY PETITIONER FOR GRANTING THE WRIT

1. *Death Penalty Sanctions against a Bankruptcy Litigant*

Legg misrepresents Trustee's letter to the Fifth Circuit court requesting reconsideration of its decision not to publish its affirmance of the sanctions order. A true and correct copy

is incorporated as Appendix A. Even if these misstatements were taken as true, there would still be the requirement under Legg's presentation that he has established his financial impairment. He was given the opportunity to establish that and refused to do so. To the extent that Legg attempts to make headway out of the Article 1 versus Article 3 court distinction, it was the Fifth Circuit Court and District Courts which either ordered and set the sanctions or upheld the sanction awards upon appeal, and it was the District Court which granted Trustee's motion to enforce those sanctions.

1. *Non-Payment of Monetary Sanctions*

The cases cited by Legg in support of this reason for granting the writ are Rule 11 cases. Even so, the case cited by him of *In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), states that the:

> primary purpose of sanctions is . . to deter subsequent abuses. This policy is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions.

The imposition of the monetary sanctions in the earlier proceedings have had absolutely no deterrent effect - in Adversary Proceeding No. 87-0866, Legg was and remained a most active participant before the Bankruptcy and District

courts for over three years after entry of the sanctions order; in C.A. H-88-1958, the sanctions order was the result of unfettered access to the courts. The sanctions order became final because no further appeal was taken by Legg and the case became moot (in all respects other that the sanctions order); in Adversary Proceeding No. 85-0932, Legg was allowed total access to the District Court and the Fifth Circuit Court to appeal the sanction order, and both Courts affirmed. Each of the courts involved in imposing the sanctions orders accorded Legg all due process - hearings were held, Legg was free to and did participate, evidence was taken on the particular damage (fees sustained) of each case and Legg either appealed and lost or allowed the order to become final. Before being held in contempt, Legg was given the opportunity to show an inability to pay the sanctions, but he refused.

These matters were concluded. Yet, even at the end of the matter, Legg did not pay the ordered sanctions. Legg continued in pursuing causes which did not belong to him and in abusing the bankruptcy system.

The Court has the right to structure the sanctions necessary or warranted to control its docket, to maintain the orderly administration of justice or to enforce its orders. *Vinson v. Heckman*, 940 F.2d 114 (5th Cir. 1991). The striking of the pleadings is about the only structured penalty to fit the flagrant actions of Legg over the past nine year ordeal of this case. Further, when you consider the pleadings which were struck, there has been absolutely no harm. On its face, the claim asserted against the Trustee was based solely upon the invalidity of certain orders. Those certain orders have been

upheld all the way to the U.S. Supreme Court. Even Legg acknowledged this fact by his effort to obtain an eleventh hour leave to amend his pleadings. Further, on their face, the claims asserted against Obaid, OBALCO and OTS are corporate causes and belong to the Trustee. His efforts to "personalize" the allegations by way of his Motion for Leave to Amend do not change the true nature of the underlying causes which belong to the Trustee (assuming such causes exist or are valid). In any event, Legg was unable to persuade the District Court to grant leave to amend his pleadings. The pleadings struck, therefore, would have gained Legg nothing.

Finally, Legg was accorded even one more safety net. He was given a thirty day period to pay the sanctions or prove an inability to pay. This he rejected as well. In fact, at no time has Legg attempted to establish any inability to pay. Quite the contrary, most of the time spent by him during this bankruptcy case has been out of the country for his international clients, as the history of motions for continuances establish.

Legg demands that his access to the courts be continual notwithstanding the costs to other parties in interest and the importance that the directives and the orders of the courts be followed. However, there are many other parties, in addition to Legg, legitimate parties whose rights have been and are affected by this bankruptcy and Legg's delays, who must be considered. The system has bent over backwards to be fair to Legg. He has not reciprocated. He has cost the administration dearly by expense and delay. He has not paid sanctions ordered. He has not paid the judgment against him, now over $400,000 in amount.

3. *Rule 12(b)(6)*

Trustee does not concede that the court relied upon Rule 12(b)(6) in any form or fashion. However, for the sake of argument, the pleadings of Legg against Trustee were based solely upon a challenge to the validity of the Order for Relief and the Order appointing Trustee. As before stated, these Orders were challenged on many occasions and upheld at each and every instance and on appeal. Legg even acknowledged this in his Motion seeking leave to replead.

In response to the concession Legg attributes to Trustee, Trustee did concede that the important books and records were not recovered by him, but it was Trustee's belief that the same were taken by Legg; Trustee did acknowledge that he had been informed by Legg that they had been taken and had been seen in the Virginia offices of OBALCO, however, the "affidavit" relied upon by Legg in establishing this fact did not say what Legg said it said; further, Trustee did rely upon statements of third parties who saw Legg leaving the UMI premises on or about the day of the involuntary petition, with records of UMI; and Trustee has done everything that he can to secure recovery of the books.

4. *Rule 41(b) and Inherent Power*

The argument under Rule 41(b) presupposes an inability to pay monetary sanctions. As stated before, there has been no finding to that effect, although Legg was afforded several opportunities to attempt to establish that fact. All were rejected by him.

The federal courts have the power to dismiss a cause or strike a pleading with prejudice for failure to prosecute or to comply with court orders. This authority is inherent; this authority is also pursuant to Fed.R.Civ.P. 41(b), (c). *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed 2d 734 (1962); *Pond v. Braniff Airways, Incorporated*, 453 F.2d 347 (5th Cir. 1972).

A federal district court has the power to control its docket, including the power to dismiss a case or a counterclaim and cross claim as a sanction for failure to obey orders. *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406-07 (5th Cir. 1993), cert den'd sub nom., *Fox v. Natural Gas Pipeline*, _____ U.S. _____, 114 S.Ct. 882, 127 L.Ed 2d 77 (1994). That dismissal should be upheld unless there can be shown an abuse of discretion. *Frame v. S-H, Inc.*, 967 F.2d 194, 202 (5th Cir. 1992).

Sight should not be lost of the fact that the sanctions imposed upon Legg started at a much lesser drastic state. In Adversary Proceeding No. 85-0932, Legg was warned that sanctions might be imposed, but it was not until February of 1989 that sanctions were finally awarded for continued abuse. Before the first monetary sanction award, the Fifth Circuit, by its Opinion dated December 2, 1988, warned Legg of the possibility that sanctions might be incurred if he persisted in his actions. The next drastic sanction alternative was required - the actual imposition of monetary sanctions. This lead to no out of pocket penalty and Legg continued to abuse the system and the procedures. Legg caused the Court to go to the next level of severity, the striking of pleadings and contempt. Still,

safeguards were provided Legg and he failed to utilize these safeguards.

CONCLUSION

Petitioner has failed to show the requisite special and important reasons for granting same. The petition for writ of certiorari should be denied.

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APPENDIX "A"

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May 23, 1994

Mr. Charles R. Fulbruge, III, Clerk
United States Court of Appeals for
the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 93-2613; In the Matter of United Markets International, Inc., W. Steve Smith, Trustee vs. R. David Legg

Dear Mr. Fulbruge:

I am the Trustee of the Bankruptcy estate of United Markets International, Inc. and was the Appellee in the

captioned case. The Panel deciding that case consisted of Circuit Judges Garwood, Smith and DeMoss. The Panel decided not to publish their Opinion. My letter today is to request of the Panel reconsideration of that decision. I believe that the Opinion "concerns or discusses a factual or legal issue of significant public interest", or "calls attention to an existing rule of law that appears to have been generally overlooked" or "applies an established rule of law to facts significantly different from those in previous published opinions applying the rule". L.R. 47.5.1.

I have served as a trustee since 1975. In that period of time I have faced countless debtors or principals of debtors who, for whatever reason, have decided that the rules of bankruptcy do not apply to them and that any and all efforts by the trustee to recover property of the estate or to enforce rules and regulations upon them will be met with a scorched earth campaign. That scorched earth campaign puts the trustee in the unenviable position of declining to pursue his fiduciary duty or facing criticism when he attempts to recover his costs for his efforts. In my years of trustee practice there are probably a hundred cases, in addition to this case, where this has been true. Some of the more celebrated cases are R. E. Allender (beginning in 1982), Shearn Moody (1986), P. T. Eichelberger, Jr. (1989), Suzanne Frame (1990), and Nicholas Bachynsky (1989). Multiply my experiences by the 1500

trustees around the country and you can imagine the costs to the bankruptcy system.

In preparing my motion to Judge Black for enforcement of the sanctions and in briefing the appeal to this Court, I could find no decisions that addressed head-on the type of bankruptcy abuses faced by this Court in this case. I was, therefore, forced to analogize to the prisoner cases and some of the other civil litigation type abuse cases. The publication of this Opinion would give the trustees another weapon for their arsenal and would put the litigious debtors and principals of debtors on notice that abuse of the system will not be tolerated.

I therefore request that the Panel reconsider its decision and allow this Opinion to be published.

Sincerely,

BONHAM, CARRINGTON & FLOYD, P.C.

By: _____
W. Steve Smith

WSS/WSSUMI.C76/jaf

cc: Hon. Norman W. Black
Hon. R. F. Wheless, Jr.

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

(3)

No. 94-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
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R. DAVID LEGG,
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Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 8, 1994

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The thrust of Respondent Smith's Opposition is that Petitioner Legg's "facts" are in error, and then Smith proceeds with a diatribe of data irrelevant to and/or subsequent to the entry of the Order under appeal. Legg will address those matters in the order set forth in the Opposition:

At no time were the two appeals from No. 85-0375, the seizure of Legg's homestead and a money judgment, termed without merit or frivolous by any court. Smith's complaint is that Legg failed to "roll over and play dead," instead choosing to exhaust his legal remedies. Smith also misleads this Court by stating that Legg has appealed an accounting ordered in No. 85-0375 and that was upheld; No such appeal exists. An order to account is not even final and appealable until enforcement to compel the accounting is sought. To date, no such enforcement has been sought by Smith, nor any judge below,

since its entry in 1988.[1]

Legg's standing, as a party interest, to object to claims against UMI is clear, and the forum for such adjudication is the cause below. *See* Legg's Petition, p.6-7, n.1. The validity of an Order for Relief does not sanctify any individual claim filed in any given bankruptcy case. Likewise, it is not within Smith's, nor the District Court's, power below to decide what evidence is, or is not, credible in the trial of No. 87-0866, now at bar in No. H-92-2141.[2] It is the jury that decides factual issues, and that jury trial was mandated by withdrawal of reference and this Court's case law.

Legg's Motion to Amend his Answer, etc., below, to conform with judgements subsequently entered and to narrowly plead only personal causes of action in No. H-92-2141, was ruled "moot" due to the striking of his pleadings. No ruling was made on the validity of his claims under that amended pleading. *See* Petition, Appendix C-2.[3]

---

[1] Legg has repeatedly stated under oath that it is impossible for him to account without the books and records of UMI and without access to UMI's and his own personal bank records which are in the possession of Smith and to which Legg has been denied access by the District Court below. *See also* Petition for Certiorari, p. 18 n. 8 for the District Court's acknowledgement, "I don't know how you can make someone do something he says he can't." This inability to account is a non-issue with regard to the questions presented to the Court in the Petition.

[2] Legg can think of no reason Smith conceals from this Court the existence of U.S. Army Corps of Engineers documents proving the invalidity of Defendant OBALCO's claim against the UMI estate which would be offered at trial of this matter, other than: (1) Smith refused to subpoena those documents, for years obstructing Legg's efforts to obtain them, (2) Smith has refused to review those documents since they were obtained, and (3) those documents shed light on his own mis-administration of UMI and his liability therefor. Additionally, witness testimony will support Legg's case against Defendants Obaid, OBALCO and OTS. *See* note 6, below.

[3] Contrary to Smith's assertion, no statutes of limitation expire for any malfeasance in his capacity as trustee (or his personal liability therefor) until two years after the close of the UMI case, which has not yet occurred. Also, Smith's law firm was not name as a party in the amended pleading.

See also Petition at pp.6-7 (including n.1 & 2), p.15 (including n.5) and Appendix F-6, n.2.

The Fifth Circuit below expressly did not rule on any contempt issues as none arose prior to the Order under appeal, are not relevant hereto and will be the subject of another proceeding, if necessary. *See* Section 4 below, "Rule 41(b) and Inherent Power." However, Smith attempts to raise this and a mandamus proceeding[4] to prejudice the Court. Counsel is unaware of any alleged bench warrant being sought to be enforced, however, this matter will be addressed in a separate proceeding when, and if, such becomes necessary, and same is irrelevant to the issues presented to this Court.

1. Death Penalty Sanctions Against Bankruptcy Litigant

Appendix A is a letter dated June 2, 1994, to the Clerk of the Fifth Circuit from U.S. Bankruptcy Judge, R.F. Wheless, Jr.[5] In the letter, the bankruptcy judge states clearly his intention to use this case as precedence giving the bankruptcy court power to strike pleadings of litigants for failure to pay monetary sanctions and states that heretofore no case law has given him such clear authority (para.2).

In the case at bar, sanctions entered by an inferior bankruptcy court

---

[4] After the entry of the Order under appeal, on August 17, 1994, Legg learned that the District Judge presiding below, who has ruled in other UMI cases, is the cousin of one of Legg's adversaries in the UMI litigation. Since Legg was enjoined from filings and could not request the judge recuse himself, his only recourse was to seek the judge's recusal by mandamus to the Fifth Circuit under 28 USC 455 and 28 USC 144. Although the mandamus was denied without opinion, no ruling termed that suit without merit or frivolous. *Immediately* after Legg filed the mandamus, Smith moved to hold Legg in contempt. In violation of the mandatory provisions of 28 USC 144 requiring him to stand down, the District Judge below set a contempt hearing in Legg's absence (prior to the ruling on the mandamus) and, thereafter, held him in contempt in absentia.

[5] Sitting both in the case below prior to the withdrawal of reference and in the UMI bankruptcy main case, his Honor also entered the Rule 11 sanctions enforced herein.

were enforced by the District Court to deny a party his constitutionally mandated District Court jury trial. With this case as precedence and now being used by bankruptcy judges to strike pleadings, litigants sued in bankruptcy court, who have a right to an Article III court jury trial under *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), can be sanctioned by an Article I court, have their pleadings stricken for non-payment of monies, and never be granted their right to withdrawal of reference to the District Court for jury trial--all this being accomplished by an Article I court without the constitutional authority to preside over such a case in the first place. Review should be granted in this case to repudiate the imposition of sanctions entered by an Article I court to deny an Article III court jury trial. Likewise, since this case involves various types of monetary sanctions, it is an ideal vehicle for this court to set forth guidelines for the imposition of death penalty sanctions against bankruptcy litigants for the non-payment of monetary sanctions.

2. Non-Payment of Monetary Sanctions

Smith cites no cases from this Court, nor any other authority, setting forth the standards which are to be used in determining financial inability when a bankruptcy litigant's pleadings are to be stricken for failure to pay monetary sanctions, and indeed, by his own admission and that of the bankruptcy judge below, there are none. This Court's guidance is warranted.

3. Rule 12(b)(6)

Nowhere in the record below is there *any* evidence that Legg had anything to do with the theft of UMI records. Smith conveniently omits any record cites to affirm his naked allegation which is now being raised for the first time. Smith alluding to what he "has relied upon from third parties" is designed to misdirect this Court's attention from the fact that he was informed Defendant OBALCO had those records in 1985. His statement should be stricken as scandalous and outside the record. If these anonymous "third parties" in fact exist, they should be have been identified by now (which they

have not) and their credibility assessed by the jury.[6]

4. Rule 41(b) and Inherent Power

The striking of Legg's pleadings and injunction against further filings was entered against Legg *prior* to any factual determination of his ability to pay the sanctions being enforced. The Fifth Circuit's Opinion below clearly states inability to pay is not at issue below, nor is any contempt citation which may have subsequently issued. *See* Petition, Appendix A-9 at n.9, A-13 & A-14. Since Legg was enjoined from filing pleadings with the District Court, he was at a loss as to how to show inability to pay without so filing.[7] Legg did the only thing he thought acceptable; he filed a *fourteen* page sworn affidavit with a financial statement (based upon a U.S. Government form from the Small Business Administration) detailing his deplorable financial condition with assets of $1170, far exceeded by his debt, indicating a negative net worth. His current income as a singing waiter (substantiated by his paycheck) averaged $300 per week. A narrative detailing his unsuccessful professional endeavors since 1985 was included. (District Court R. at pp.587-600). Due to length, only portions of that affidavit are set forth in Appendix B-1.[8]

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[6] The only evidence of record concerning theft of UMI books and records are the sworn affidavits and depositions which support Legg's assertion that OBALCO facilitated the theft of same so that it could take over UMI's contract and earn the profits associated therewith (evidenced in the Corps of Engineers documents); those deponents have been identified (Marty Maloney, Kelly Antwine and Lyn Cypert) and will testify at trial. As to whether or not their sworn statements are credible or do in fact support Legg's position, these are fact issues to be decided by the jury, not at the whim of Smith or the District Judge below.

[7] Legg couldn't even file a Motion for Reconsideration requesting the District Court's be more specific in its Order as to how he was to comply, nor could he file a Motion requesting a hearing within which to submit evidence of financial inability.

[8] The omitted portions of this affidavit deal with: (1) documenting that all but two (of the nine persons and entities) owed sanctions are now dead or defunct with no successors joining in this proceeding, and thus, even if he could pay (which he could not), Legg would require further instruction from the District Court beyond

Evidently, this wasn't good enough; but how else can a party "prove" to a court that he is financially unable to pay, particularly when he has been enjoined from filing further pleadings and denied his own bank records by that court? It is access to those records that the striking of his pleadings (which included a motion to compel access to same, ruled "moot") denied.

The Order of the District Court contained no provision for reinstatement of Legg's pleadings upon payment of monies sanctioned or satisfying the court that he could not pay. It set forth no guidelines by which Legg could judge his compliance, other than the payment of "all sanctions previously imposed against him," and even this is vague as it sets forth no monetary amounts to be paid, nor instructs Legg to whom he must pay such amounts since many of those awarded sanctions are now defunct. *See* Petition, Appendix C-1 & C-2, and note 8 above. Likewise, the Order was devoid of direction as to (1) what would satisfy the court as to financial inability and (2) how to prove it, given Legg was enjoined from filing pleadings. This denial of due process is apparent and should be reviewed (and eventually repudiated) by this Court.

Legg is not popular among bankruptcy trustees or the bankruptcy court system.[9] However, the popularity of a litigant or his case is not an issue to be considered by this Court when deciding if that case is worthy of review. Since 1985, Legg has sought only one thing--a

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the face of its Order, and (2) A telefax from Defendant Obaid, the owner of Defendants OBALCO and OTS, who is in default below for failure to answer request for admissions and other discovery, admitting that he intentionally ignored Legg's discovery request and would continue to do so.

[9] Legg exposed abuse in the bankruptcy system by initiating a Houston Chronicle investigation (which later won the American Bar Association's Award for Excellence in Journalism) and cooperating with an ABC News "20/20" investigation. At Legg's request, Congressman Jack Brooks (D-Tex), Chairman of the House Judiciary Committee, responded personally and launched a nationwide criminal and civil Congressional investigation into the U.S. Trustee system which was conducted by the General Accounting Office. Under investigation - Trustee W. Steve Smith, Respondent herein, for his notoriety in "never closing cases."

jury trial against Obaid, et al, to prove their claims false. This case involves millions of dollars in missing UMI monies, and documented evidence now shows those monies to be in the pocket of Obaid and OBALCO. Likewise, Smith, as a bankruptcy trustee, is not granted judicial immunity and must be held accountable for his acts of professional malfeasance before a jury. These parties, owed sanctions by Legg today, may well owe him monies at the conclusion of a jury trial.

CONCLUSION

Having shown the requisite special and important reasons for granting his request for writ of certiorari, Petitioner R. David Legg asks that his petition for certiorari be granted.

SHERRI NARRO
Counsel of Record
for Petitioner
P.O. Box 22413
Houston, Texas 77227-2413
(713) 961-0410

APPENDIX A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
515 RUSK STREET, RM. 4025
HOUSTON, TEXAS 77002-2603

R.F. WHELESS, JR. (713) 250-5785
UNITED STATES BANKRUPTCY JUDGE

June 2, 1994

Mr. Charles R. Fulbruge, III
Clerk of the Fifth Circuit
United States Court of Appeals
600 Camp Street
New Orleans, Louisiana 70130

RE: Bankruptcy Case No. 93-2613;
In Re United Markets
International, Inc.,
W. Steve Smith, Trustee vs.
R. David Legg

Dear Mr. Fulbruge:

I have received a copy of Mr. Steve Smith's letter to you of May 23, 1994 involving the above styled case. A copy of that letter is attached for your reference. Naturally I would defer to any final decision of the Circuit concerning publication of the involved opinion, but I think that publication has some advantages.

On several occasions in the past, I have been asked to strike pleadings of several parties who have refused to pay sanctions, but I was never clear that I had the authority to do so. This case establishes that authority. For that reason I believe it to be of precedential value.

Further, I do not expect for R. David Legg to voluntarily obey the order of this Court to give an accounting of the funds taken by him

out of United Markets International nor to pay the sanctions assessed against him nor respond to the money judgment in favor of the Trustee. Publication of Mr. Legg's deeds would constitute a sanction in and of itself, and I personally feel that this is warranted by his behavior. Lastly, I feel that publication of this opinion would be helpful to an understanding by other trial courts (before whom Legg may hereafter appear) of Mr. Legg's mode of operation, as determined in the referred to matters.

Yours truly,

/s/ R.F. Wheless, Jr.
R.F. Wheless, Jr.
United States Bankruptcy Judge
Southern District of Texas

RFW/lgl
Enclosure

cc: The Honorable Norman W. Black
Chief Judge, U.S. District Court
Southern District of Texas
515 Rusk Avenue, Room 11535
Houston, Texas 77002

Mr. W. Steve Smith
Bonham, Carrington & Floyd, P.C.
910 Louisiana, Suite 400
Houston, Texas 77002-4906

Mr. R. David Legg
P.O. Box 22413
Houston, Texas 77227-2413

APPENDIX B

(RELEVANT PORTIONS OF DISTRICT COURT DOCKET #45, Record at pp. 600-599, 597-596, 587)

United States District Court
Southern District of Texas
FILED
AUG-2 1993
Michael Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: UNITED MARKETS INTERNATIONAL,
INC., Debtor C.A.NO. H-92-2141
Bankruptcy No. 85-00872

AFFIDAVIT OF R. DAVID LEGG

This affidavit is prepared pursuant to court order of the United States District Court. Southern District of Texas, entered July 1, 1993, the Honorable Chief District Judge Norman W. Black presiding. See Docket entry 43. The court required payment of "all sanctions previously assessed against him [Legg] or to satisfy the court that he has no ability to pay." The following is an effort to comply with the court's order, by showing financial inability to pay and is true and correct to the best of Legg's knowledge and belief.

Sanctions assessed against Legg are as follows:

(a) By order of the Bankruptcy Court, dated February 14, 1989, Legg was ordered to pay

(i) $4,534.00 to Trustee W. Steve Smith
(ii) $6,288.75 to Aegis Corporation
(iii) $52,870.31 to Essam Obaid, Taher Obaid, Khalil Awad, OBALCO, Bassim Farouki, Dynasystems Corporation, and C.D.

(Jack) Gilkey.

(b) By order of U.S. District Judge David Hittner, dated December 3, 1991, Legg was ordered to pay to "W. Steve Smith, Trustee for Woodard, Hall and Primm, P.C." the sum of $5,009.00.

Sanctions previously awarded against Legg total not less than $68,702.86.

A personal financial statement of R. David Legg follows, but narrative amplification is in order.

As a result of the involuntary petition filed in February, 1985, Legg lost his company, United markets International, Inc., his sole means of support. In this same proceeding, he was subsequently deprived of his homestead in 1988, and virtually all possessions therein. The bankruptcy proceeding rendered Legg both homeless and destitute, and subsequent efforts to restore financial stability have been unsuccessful.

In recent years, Legg has been involved in a business venture which involved considerable traveling. Air fares and related expenses were borne by the venture partners in this matter, not by Legg - who had no such means at his disposal. Legg was attorney for the venture partners, and his compensation in this venture was contingent on its success. In March of this year, the venture partners determined to abandon the venture, as it had produced no revenues and had been unsuccessful. Legg's services were then terminated. As no revenues were earned, no salaries or fees were paid.

Legg returned to Houston in order to prosecute the present case to trial before jury. Having no funds available, he has taken part time work which pays approximately $300.00 per week, from which he must pay living expenses and child support obligations. He is not at present actively engaged in the practice of law, and has no other source of income.

Legg's financial status is demonstrated in the following personal financial statement....

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(CONTINUING TO PAGE 4 OF AFFIDAVIT)

PERSONAL FINANCIAL STATEMENT OF
R. DAVID LEGG

ASSETS:	PRESENT VALUE:
Cash on Hand	$170.00
Accounts Receivable	0
Savings Accounts	0
Retirement Account	0
Life Insurance,Cash Surrender	0
Real Estate	0
Automobiles	None
Personal Property (clothing, personal effects, etc.)	approximately $1000
Value of Total Assets:	approximately $1170

LIABILITIES:	AMOUNT OWED:
Accounts payable	$3088.90
Notes payable	0
Installment Accounts	approximately $3000
Other Liabilities	$600/mo.
	approximately $6688.90

Accounts payable are owed to Marshall field's/Target ($1,115.92), Neiman Marcus ($1780.40) and VISA ($192.98)

Installment accounts are for rent and telephone through November 1, 1993 totalling approximately $3000.

Other liabilities are payable as child support to ex-wife for two children: said amount due is $300 per child per month at the present

time.

APPROXIMATE NET WORTH (excluding Contingent Liabilities): ($5518.90)

SOURCE OF INCOME:

Salary and Tips--See Exhibit C, Attached hereto, for Earnings

CONTINGENT LIABILITIES:

Legal Judgments (amounts are approximate & exclude post-judgment interest):

1. Judgment Entered in Adversary 85-0375 in 1989 $444,858.41

2. Sanctions Judgment awarded in Adversary 85-0932 $62,693.86

3. Atty's fees awarded in C.A. H-88-1958 $5,009.00

Total of judgments listed above: approx.$512,561.27

APPROXIMATE NET WORTH (Including Contingent Liabilities): ($518,080.17)

FURTHER AFFIANT SAYETH NOT.

/s/ R. David Legg
R. David Legg

SWORN AND SUBSCRIBED BEFORE THE UNDERSIGNED ON AUGUST 2, 1993.

/s/ Christie C. Vela
Notary Public

my commission expires:

/s/ 7-22-95

CHRISTINE C. VELA
NOTARY PUBLIC
*
STATE OF TEXAS
EXPIRES
7-22-95

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(CONTINUING TO EXHIBIT C OF AFFIDAVIT)

EXHIBIT C

CAFE ANTHONY, INC. 5047

--EMPLOYEE--
01-0000015 LEGG,D

PAY RATE	PERIOD END	CHECK NO.
2.130 HB	07/18/93	005047

EARNINGS	HOURS	AMOUNT	YTD
WAITERS	109.50	233.24	303.00
TIPS REPORTED	.00	268.00	354.00

DEDUCTION	AMOUNT	YTD
Federal W/H	60.62	69.42
FICA	31.08	40.74
MEDICARE	7.27	9.53
TIPS REPORTED	268.00	354.00
GROSS EARNINGS:	501.24	657.00
NET EARNINGS:	134.27	
TOTAL DEDUCT:	366.97	473.69